TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No. 1069

WM. H. LAKIN,

Plaintiff in Error.

vs.

J. H. ROBERTS ET AL.,

Defendants in Error.

On Application for Writ of Error or Certiorari to the Circuit Court of Appeals, Ninth Circuit.

Filed, ... *1893.*

IN THE SUPREME COURT

OF THE

UNITED STATES.

WM. H. LAKIN,

PLAINTIFF IN ERROR AND PETITIONER,

vs.

J. H. ROBERTS ET AL.,

DEFENDANTS IN ERROR.

TRANSCRIPT ON APPLICATION FOR WRIT OF ERROR OR CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

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No. 28.

TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

APRIL TERM, 1892.

WM. H. LAKIN, PLAINTIFF IN ERROR,

vs.

J. H. ROBERTS, W. C. ROBERTS, M. KERR AND MRS. KERR, HIS WIFE, P. LAURENZI, JOHN DALY, P. TIVENON, M. ANTONOVICH, J. F. BACHER, JOHN WILLOUGHBY, JOHN NEVILL, JOHN KNIGHT, A. CURTIS, D. ROBINSON, H. B. HOUGHTON, J. F. HOUGHTON, JOHN THOMAS, JAS. MENZIES, GEO. WOODWARD, MRS. ANNA JENKINS, O. B. DOLLY, AND MRS. DOLLY, HIS WIFE, M. A. PASSETTA, B. L. JONES, M. WILLOUGHBY, W. H. THOMAS, JOHN POWNING, SOL. BABB, MRS. BABB, HIS WIFE, GEO. HAKE, G. E. COOK, FRANK MEFFLEY, GEO. MAXWELL, ROBT. PENMAN, L. CIPRIOTTO, FRANK TUCKER, H. S. DUNN, WM. LITTECOTT, JOHN CREIGHTON, F. VANZINI, EDWARD MITCHELL, WM. GALLAGHER, A. GRAZIER, H. PERIN, M. CURTIS, E. STEPHENS, JACK MONI, HENRY DONEY, AND L. GRONDONI, DEFENDANTS IN ERROR.

TRANSCRIPT ON WRIT OF ERROR.

TO THE U. S. CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

Endorsed: Filed Mar. 26, 1892, F. D. Monckton, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

WM. H. LAKIN, PLAINTIFF IN ERROR,

vs.

J. H. ROBERTS ET AL., DEFENDANTS IN ERROR.

TRANSCRIPT ON WRIT OF ERROR.

TO THE U. S. CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

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1 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

WM. H. LAKIN, Plaintiff,

vs.

J. H. ROBERTS, W. C. ROBERTS, M. KERR and MRS. KERR, his wife, P. LAURENZI, JOHN DALY, P. TIVENON, M. ANTUNOVICH, J. F. BACHER, JNO. WILLOUGHBY, JNO. NEVILL, JNO. KNIGHT, A. CURTIS, D. ROBINSON, S. SORACCO, R. TRAMALONI, H. B. HOUGHTON, J. F. HOUGHTON, JNO. THOMAS, JAS. MENZIES, GEO. WOODWARD, MRS. ANNA JENKINS, O. B. DOLLY and MRS. DOLLY, his wife, M. A. PASSETTA, B. L. JONES, M. WILLOUGHBY, W. H. THOMAS, JNO. POWNING, A. TRAVEGA, SOL. BABB and MRS. BABB, his wife, GEO. HAKE, G. E. COOK, FRANK MEFFLEY, GEO. MAXWELL, ROBT. PENMAN, L. CIPRIOTTO, HENRY, DONEY, FRANK, TUCKER, H. S. DUNN, WM. LITTECOTT, JNO. CREIGHTON, F. VANZINI, EDWARD MITCHELL, WM. GALLAGHER, A. GRAZIER, H. PERIN, M. CURTIS, E. STEPHENS, JACK MONIE, A. DALY, IRA DEARBURN, JOS. INGRAM, S. TRENGOVE, H. PASCOE, JOS. TIPPETT, A. PICKENS, RICH'D KEMP, L. GRONDONI, A. PEZZOLA, JOHN WEGAN, F. SOBRERO, B. FERNGARO, JOS. GIAMBRONE, CARLO PAGGI, BAPTISTO LEDONESIS, JOHN DALY, A. PASCU, C. CARLO, JOHN SOROCCO, JNO. GRONDONI, PETER CUNIO, LOUIS PEZZALO, BERTO SALARI, JNO. CUNIO, NICHOLAS SALARI, JOHN DOE, RICHARD ROE, JOHN DENN, RICHARD DENN, JOHN FENN and RICHARD FENN, Defendants.

The plaintiff, Wm. H. Lakin, who is a citizen of the State of Ohio, and a resident of Clermont County, in said State, complains of the defendants above named, all of whom
2 are citizens of the State of California, and residents of the County of Plumas, in said State, and for cause of action alleges:

1st. That plaintiff is, and since the 19th day of November, 1888, has been the owner, seized in fee, and entitled to the possession of the following described premises situated in the County of Plumas, and State of California, to wit:

Beginning at a point N. 45 deg. 30 min. E. 2100 ft. distant from an iron pin set in a rock near the mouth of the "railroad" tunnel, Plumas Eureka Mine, said iron pin being the initial

point of the patent survey of the Eureka Quartz Mine (from which pin a hole drilled in a large rock bears N. 54 1-2 deg. E. 151, 8 ft. distant) (from said point of beginning an iron pin set in a large green stone rock bears N. 38 1-4 deg. W. 96.40 ft. distant) and running thence (1st) S. 44 1-2 deg. E. 1192.5 ft. to a post in rock mound from which an iron pin set in the top of a large green stone rock bears N. 87 1-2 deg. E. 80.5 ft. distant and post M. No. 2 of the Mammoth patented land bears S. 76 1-4 deg. W. 185.44 ft. distant; thence (2nd) N. 76 1-4 deg. E. 1769 ft. to the northerly corner of Plumas Eureka Company's pressure box or tank on tail ditch from the "Mohawk" mill, from which post M. No. 3 of the Mammoth patented lands bears S. 36 1-2 deg. W. 156.5 ft. distant; thence (3rd) N. 87 deg. 47 min. E. 740 ft. to a post in rock mound 75 ft. northerly from the Plumas Eureka Company's Sulphuret works, 856 ft. to center of Jamison Creek; thence up the center of Jamison Creek as follows: (4th) S. 30 deg. E. 290 ft. (5th) S. 64 1-2 deg. W. 300 ft. (6th) S. 42 1-2 deg. W. 220 ft. (7th) S. 15 deg. W. 340 ft.; thence across island. (8th) S. 55 deg. W. 480 ft. to intersection with the third course of the said Mam-
3 moth patented lands; thence on said third course. (9th) S. 9 deg. 57 min. E. 270 ft. to an iron pin set in a ledge of Hornblendic greenstone described in said Mammoth patent as an "iron pin set in a Basalt rock;" thence (10th) S. 64 deg. 53 min. W. 200 ft. to center of Jamison Creek; thence up the center of Jamison Creek (11th) S. 7. deg. E. 335 ft. to its intersection with the fifth course of the Mammoth patented lands; thence (12th) S. 80 deg. 45 min. E. 854 ft. to corner M. No. 5 of said Mammoth patented land, from which a cedar tree 24 inches in diameter bears S. 83 1-2 deg. E. 16 ft. distant, a cedar tree 24 inches in diameter bears S. 2 1-4 deg. E. 24.75 ft. distant and a pitch pine 24 inches in diameter bears N. 83 1-2 deg. W. 64.5 ft. distant; thence (13th) N. 30 deg. 20 min. E. 4355 ft. to a pine stump 5 ft. in diameter M. No. 6 of said Mammoth patented lands; thence (14th) S. 88 deg. 20 min. W. crossing Jamison Creek 1395 ft. to post M. No. 7 of said Mammoth patented lands from which a pine tree 18 inches in diameter bears S. 46 1-2 deg. W. 23.3 ft. distant, the N. E. corner of the graveyard fence bears S. 53 deg. W. 29.70 ft. distant, and the 1-4 section corner on South boundary of Sec. 12, T. 22 N., R. 11 E. Mt. Diablo Base and Meridian, bears N. 71 deg. 53 min. W. 320 ft. distant; thence

(15th) S. 69 deg. W. 2450 feet to post M. No. 8 of said Mammoth patented lands; thence (16th) N. 45 deg. 11 min. W. 842 ft. to corner M. No. 9 of said Mammoth patented lands from which a sugar pine stump 5 feet in diameter bears S. 46 1-2 deg. E. 30 ft. distant; thence (17th) N. 45 1-2 deg. E. 594 ft. to corner M. No. 10 of said Mammoth patented lands from which a pitch pine tree 36 inches in diameter bears N. 85 deg. 42 min. E. 168 ft. distant; thence (18th) N. 44 deg. 30 min. W. 214 ft. to a post in rock mound M. No. 11 of said Mammoth patented lands, from which the S. W. corner of Sec. 12, T, 22 N., R. 11 E., Mt. Diablo Base
4 and Meridian bears S. 55 1-2 deg. W. 438.6 ft. distant; thence (19th) S. 45 deg. 30 min. W. 2288 ft. to a post in rock mound from which an iron pin set in a large green stone rock bears N. 31 1-2 deg. W, 47 ft. distant; thence (20th) S. 44 deg. 30 min. E. 50 ft. to the place of beginning.

2nd. That the defendants, and each of them, wholly disregarding the rights of said plaintiff, heretofore, to wit: on the 19th day of November, 1888, wrongfully and unlawfully entered upon the said tract of land belonging to this plaintiff, and wrongfully and unlawfully ousted this plaintiff therefrom, and wrongfully and unlawfully withhold the possession thereof from this plaintiff.

3rd. That the plaintiff is ignorant of the true names of the defendants John Doe, Richard Doe, John Denn, Richard Denn, John Fenn and Richard Fenn, and therefore sues them by said fictitious names and plaintiff prays that when their true names are discovered this complaint may be amended by inserting the same.

4th. That the value of the premises so withheld by defendants from plaintiff, and in controversy in this action, exceeds the sum of five thousand dollars.

Wherefore plaintiff prays judgment that he recover the possession of said premises from the said defendants, and each of them, and have a writ of restitution therefor; and that he recover his costs herein expended.

5 Duly verified.

H. L. GEAR,

Attorney for Plaintiff.

Endorsed: Filed December 5th, 1889. L. S. B. Sawyer, clerk.

(Here follows pages 6 to 21 inclusive in original record which contain the summons and return of service which are omitted from the printed transcript pursuant to stipulation.)

Answer.

22 (Title of court and cause.)

Now come J. H. Roberts, W. C. Roberts, M. Kerr, and Mrs. Kerr, his wife, P. Laurenzi, John Daly, P. Tivenon, M. Antonovich, J. F. Bacher, John Willoughby, John Nevill, John Knight, A. Curtis, D. Robinson, S. Sorocco, H. B. Houghton, J. F. Houghton, John Thomas, Jas. Menzies, Geo. Woodwood, Mrs. Anna Jenkins, O. B. Dolly and Mrs. Dolly, his wife, M. A. Passetta, B. L. Jones, M. Willoughby, W. H. Thomas, John Powning, Sol Babb, and Mrs. Babb, his wife, Geo. Hake, G. E. Cook, Frank Meffley, Geo. Maxwell, Robt. Penman, L. Cipriotto, Henry Doney, Frank Tucker,
23 H. S. Dunn, Wm. Littecott, John Creighton, F. Vanzini, Edward Mitchell, Wm. Gallagher, A. Grazier, H. Perrin, M. Curtis, E. Stephens, Jack Moni, A. Daly, Ira Dearburn, Jas. Ingram, H. Pasco, Jas. Tippett, A. Pickens, Richard Kemp, Z. Grondoni, and John Wegan, some of the defendants, and answering for themselvs alone, deny:

1st. That plaintiff owns, or ever owned, or was ever seized of, or is, or ever was entitled to the possession of the land described in the complaint, or any portion thereof.

2nd. That these defendants, or either or any of them, ever wrongfully or unlawfully entered upon said tract or ousted the plaintiff therefrom, or from any portion therefrom, or that they or either of them ever withheld the same or any portion of said land from plaintiff, save and except a small portion thereof occupied and described as the town of Johnsville which town is particularly marked and designated by survey and plat on file with the Recorder of Plumas county as the Official Plat of said town, and except also, three certain lots on what is called Eureka Hill, west of said town, hereinafter more particularly described, all of which said excepted portions comprise about twenty-one acres of land and which are held by the defendants severally, each holding a separate and distinct lot or portion thereof, as hereinafter more particularly described.

Further answering defendants allege:

1st. That the town of Johnsville is situated on said tract of land; that it is a place of business and trade with a population of more than two hundred people, and having public buildings and a cemetery, and has been such for more
24 than thirteen years last past; that the said town occupies about twenty acres of land and is laid off in streets, blocks and lots, and has been regularly surveyed, and an official plat of said survey is on file with the Recorder of Plumas county, California, showing the said streets, blocks and lots, and the extent and location of the same.

2nd. That most all of these defendants are residents of said town, and they and their several grantors have been such residents during the existence of said town, and they severally are, and for more than six years last past, they and their several grantors have been in the open, notorious, peaceable and exclusive posession and occupancy of certain lots, pieces and parcels of said town-site lands, that is to say: The defendant J. H. Roberts and his grantors of Lot two in Block nine; defendant W. C. Roberts and his grantors of Lot three in Block nine; defendant Kerr and his wife and their grantors of Lot four in Block nine; defendant Laurenzi and his grantors of Lot two in Block four and Lot five in Block nine; defendant John Daly and his grantors of Lot eight in Block nine; defendant Antonovich and his grantors of Lot one in Block ten; defendants Willoughby and their grantors of Lot five in Block five, Lot three in Block ten, and Lot three in Block fourteen; defendant Nevill and his grantors of Lot one one in Block two, Lot three in Block seven, Lot two in Block ten, Lots one and two in Block eleven and Lot one in Block twelve; defendant Curtis and his grantors of Lot two in Block twelve; defendant Robinson and his grantors of Lot three in Block eleven; defendant Houghton and his grantors of Lot one in Block one, and Lot four in Block twelve;
25 defendant John Thomas and his grantors of Lot one in Block eight; defendant Menzies and his grantors of Lot two in Block eight; defendant Woodward and his grantors of Lot two in Block seven; defendant Jenkins and his grantors of Lot one in Block seven; defendant Passetta and his grantors of Lot one in Block five, and Lot one in Block six; defendant Jones and his grantors of Lot one in Block four, and Lot three in Block six; defendant W. H. Thomas and his grantors of Lot three in Block four; defend-

ant Paesega and his grantors of Lot five in Block four; defendants Babb and their grantors of Lot two in Block one; defendant Hicks and his grantors of Lot three in Block one; defendant Cook and his grantors of Lot five in Block one; defendant Meffley and his grantors of Lot three in Block two; defendant Maxwell and his grantors of Lot four in Block two; defendant Cipriotto and his grantors of Lot four in Block three; defendant Doney and his grantors of Lot two in Block three; defendant Penman and his grantors of Lot five in Block two; defendant Tucker and his grantors of Lot one in Block three; defendant Dunn and his grantors of Lot two in Block two, and Lot three in Block three; defendant Liddcott and his grantors of Lot two in Block fourteen; defendant Creighton and his grantors of Lot four in Block fourteen; defendant Vanzini and his grantors of Lot one and two in Block eleven, Lot five in Block fourteen, and Lot one in Block twelve; and defendant Grazier and his grantors of Lots six and seven in Block nine, and Lot one in Block fourteen; as each and all of the aforesaid lots are described on the aforesaid official plat of said town. And during all of said time each of these defendants and their respective grantors have claimed title to the Lot so held by him and them respectively
26 adverse to all persons and particularly adverse to the plaintiff. And that such possession and occupancy was with the knowledge of plaintiff.

3rd. That the defendants Dearburn, Ingram and Pascoe now are, and for more than six years prior to the commencement of this action, they and their grantors have been severally in the open, notorious, quiet and peaceable possession and occupancy of three certain lots of land on Eureka Hill, immediately west of said town of Johnsville, and within the general tract described in plaintiff's complaint that is to say: The defendant Dearburn and his grantors of that certain lot known as and called the Dearburn dwelling house, lot about fifty feet square; the defendant Ingram and his grantors of that certain other lot generally known and called as the Ingram dwelling house, lot about fifty feet square; and the defendant Pascoe and his grantors of that certain other lot of land generally known as and called the Pascoe dwelling house, lot about fifty feet square, each of them and their several grantors claiming title thereto during all of said time, adverse to all persons and particularly adverse to the plaintiff, and their said several possession and occupancy of said premises was with the knowledge of plaintiff.

4th. The defendants further allege that neither the plaintiff, his ancestor, predecessor nor grantor has been seized or possessed of either or any of the said lots in the town of Johnsville or on said Eureka Hill, or of any part or portion of either of the same within six years last past.

Wherefore defendants ask that this action as to them
27 and to each of them be dismissed, and that they have judgment for their costs and disbursements in this behalf expended.

GOODWIN & GOODWIN,
Attorneys for Defendants named.

Duly verified.

Endorsed: Service of the within answer is hereby admitted this 20th day of March, 1890.

H. L. GEAR,
Attorney for Plaintiff.

Filed March 20, 1890. L. S. B. Sawyer, clerk.

Findings.

28 (Title of court and cause.)

This cause was submitted to the court upon documentary and other evidence stipulated between the plaintiff and such of the defendants as are represented by attorneys Goodwin & Goodwin; and the court having fully considered the same finds there from the following facts:—

1. That the lands described in the complaint are mineral lands, situated within the Jamison Quartz Mining District in Plumas County, State of California, and embace the lands upon which the town of Johnsville is situated; that said lands have never been sectionized by the Government of the United States, nor in any manner surveyed by the Government other than as surveyed in the proceedings to obtain the patent hereinafter mentioned under which plaintiff claims title.

2. That said patent was issued to the Mammoth Gold Mining Company, a domestic corporation, on the 18th day of May, 1877, and purports upon its face to be issued in pursuance of the Revised Statutes of the United States, upon an entry made by the said Mammoth Company, March 17th,

1877, but was in fact issued upon an application made by one John B. McGee and one James M. Thompson on
29 August 30th, 1867, under the law of Congress entitled "An act granting the right of way to ditch and canal owners over the public lands and for other purposes," approved July 26th, 1866; that the patent embraces 4,100 ft. of a gold bearing quartz lode with 252.95 acres of surface ground; that the length along the lode embraces two locations, one the original Mammoth located in 1851, being 2100 feet, and the other the Extension, located in 1865, being 2000 feet in length, and in making said location no surface ground was claimed along the line of said lode; that the actual trend of the lode upon the said Extension is, and at the time of its location and at the time the patent issued was unknown, but the lode line as located in the original Mammoth and the Extension, and as marked upon the surface of the ground, and as fixed in the patent, is a straight line along the west or north west boundary of said patented tract and within fifty feet of said boundary line; and that the surface tract covered by the patent except said fifty feet, is on the east or south-east side of said lode and extends about three-fourths of a mile therefrom.

3. That in 1851 the miners of said district adopted written laws governing the location of quartz claims therein, but such laws made no provision for the location of surface ground in connection with quartz claims in excess of one hundred feet on each side of the lode; nor was there at any time prior to 1868 any law, usage or custom in force in said district authorizing the location or occupancy of more than one hundred feet of surface ground on each side of the lode located; that the quartz miners of said Jamison District who opened and worked mines on Eureka Mountain therein, actually
30 occupied such portion of the public land as they chose for the purpose of working their mines, the extent of such occupation however was not a matter of defined custom, but of actual possession; but there was no actual possession for mining purposes of the land on which the town of Johnsville is situated except the road leading across the same from the Mammoth mine to the Mammoth mill and to Jamison city; that it was the custom in force in said district from 1856 to 1868 to record all notices of mining locations in the office of the County Recorder of Plumas County, but no notice of the location or claim of the surface ground described in

said patent was ever so recorded until the patent was placed of record, and then only as contained therein.

4. That in 1867 said McGee and Thompson, then claiming to own both the Mammoth and the Extension, caused to be made a survey and diagram of the lode and exterior boundaries of the surface ground, and on the 30th day of August, 1867, they posted on said Mammoth claim the diagram and a notice as follows: "The undersigned give "notice that they intend to apply for a patent for the vein or "lode set forth in the above diagram called the Mammoth "quartz claim, situated in the Jamison Mining District, "County of Plumas, California, and now post this notice on a "conspicuous part thereof. Dated on the ground this 30th "day of August, 1867.

"JOHN B. McGEE,
"JAMES M. THOMPSON."

That on the 7th day of September, 1867, they caused to be published in the Plumas *National* a newspaper published in said County nearest said claim the following notice:

"The undersigned give notice that they intend to apply for
"a patent for the vein or lode known as the Mammoth
81 "quartz claim situated in the Jamison Mining District,
"County of Plumas, State of California, and now post
"this notice on a conspicuous part thereof; commencing at an
"iron pin drilled into a rock on the line dividing the Mam-
"moth claim from the Eureka Claim and running thence for
"the center of the vein northeast, 4,100 feet, and including
"the land between the lode and Jamison creek for working
"purposes. Dated on the ground this 30th day of August,
"1867.

"JOHN B. McGEE,
"JAMES M. THOMPSON."

That no notice than the one first above described was ever posted, and none published other than the one last described, in the proceedings to obtain said patent; that on the 11th day of Sept. 1867, said McGee and Thompson made and caused to be filed in the United States Land Office at Marysville, California, the office for the District in which said mine was situated, an application to purchase said quartz claim under the act of Congress aforesaid; and accompanied said application with the notice and diagram first above set forth;

that they caused the notice last above described to be published in the paper as aforesaid for the period of ninety days continuously from the said 7th day of Sept., 1867; and that they took no other or further steps to procure a patent for said claim; that subsequently their right to the 2,100 feet of the Mammoth claim, with all tunnels, mills and other mining appliances appurtenant thereto passed to the said Mammoth Gold Mining Company; that in March, 1877, the said procured of the United States Surveyor-General for California an adoption of the field notes of the survey which said McGee and Thompson had made in 1867, as aforesaid, as and for a final United States survey of the whole tract described in the patent, and took such other steps in the premises, without further notice or publication, as pro-
32 cured the issuance of the patent therefor on the 18th day of May, 1877, as heretofore found; that by mesne conveyances the rights of said Company passed to the Sierra Buttes Gold Mining Company; that the rights of said McGee and Thompson in and to the Extension to the Mammoth claim having passed to the plaintiff he commenced an action in this Court against the said Sierra Buttes Gold Mining Company to enforce a trust against said Company in his favor as to said Extension, and thereafter, to wit: On the 19th day of November, 1888, he obtained judgment in said action whereby and in pursuance of which there was conveyed to said Wm H. Lakin, as part and parcel of said patented premises, the tract of land described in the complaint in this action.

5. That on the 17th day of June, 1876, one John F. Banks entered upon and claimed twenty acres of land upon which the town of Johnsville is now situated and located the same for building and agricultural purposes; that notice of his claim thereto was recorded upon the records of Plumas County prior to the issuance of said patent; that buildings were erected on portions of his said tract during the summer and fall of that year; that the claim of Banks to this tract of land became vested in some of these defendants residing in said town; that by 1880, said town became and has since remained the center of trade and business for that section of country; that during all of said time the said town was laid off into streets, blocks and lots and had a population of over two hundred persons; and that no portion of said town is within one thousand feet of the lode as located and described in the patent.

6. That in 1883, for the first time, the said Sierra Buttes Gold Mining Company demanded of the citizens of Johnsville that they should pay a nominal rent to the Company for the land occupied by them as town lots; that the defendant
33 Dolly and several other defendants paid from one to five dollars each at that time; that at no time prior to said date did any other person or company claiming to own the said land under said patent demand any rent of the citizens of said town, nor was any rents thereafter demanded until by this plaintiff in the spring of 1889; that those of defendants, if any, who entered upon the land subsequent to 1883, either obtained permission of said Sierra Buttes Company or entered upon the land within the limits of said town with the understanding that the said Company did not object to their occupancy so long as the enjoyment of its rights in the premises were not interfered with.

7. That the lands embraced in the patent were assessed for State and County purposes from 1878 to 1888, to the mining Company and it paid the taxes thereon; that after 1883, the defendants were assessed for taxes on their respective improvements on the land occupied by them, and the taxes so assessed were paid by them.

8. That in the spring of 1889, the plaintiff notified the defendants represented herein by attorneys Goodwin & Goodwin, to wit: Defendants J. H. and W. C. Roberts, M. Kerr and wife, P. Laurenzi, John Daly, P. Tivenon, M. Antonovich, J. F. Bacher, John Willoughby, John Nevill, John Knight, A. Curtis, D. Robinson, H. B. Houghton J. F. Houghton, John Thomas, Jas. Menzies, George Woodward, Mrs. Anna Jenkins, O. B. Dolly and wife, M. A. Pasetta, B. L. Jones, M. Willoughby, W. H. Thomas, John Powning, Sol Babb and wife, Geo. Hake, G. E. Cook, Frank Meffley, Geo. Maxwell, Robt. Penman, L. Cipriotto, Henry Doney, Frank Tucker, H. S. Dunn, William Littecott, John Creighton, F. Vanzini, Edward Mitchell, Wm. Gallagher, A. Grazier, H. Perin, M. Curtis, E Stephens, and J. Moni, that they must either pay rent for the land occuped by them, purchase said land, or quit the premises and move their improvements therefrom, within thirty days from such notice; that said defendants neglected and refused to perform either of
34 said requirements and remained in possession of their several lots of land within said tract.

As conclusions of law from the foregoing facts the Court finds:

1st. That as to the land occupied by said defendants the said patent is void.

2nd. That at the time that this action was commenced the plaintiff did not own nor was he entitled to the possession of the land occupied by the defendants.

3rd. That as to the defendants herein above named this action be dismissed; and

4th. That they have judgment against the plaintiff for their costs and disbursements herein.

HAWLEY, *Judge*.

Endorsed: Filed October 31, 1891.

L. S. B. Sawyer, Clerk.

Judgment.

35 (Title of court and cause.)

This cause having been submitted to the Court, and the Court having filed its Findings of Fact and Conclusions of Law herein:

Now, in accordance therewith, it is by the Court ordered, adjudged and decreed that as to the defendants, J. H. & W. C. Roberts, M. Kerr, and wife, P. Laurenzi, John Daly, P. Tivenon, M. Antonovich, J. F. Barker, John Willoughby, John Nevill, John Knight, A. Curtis, D. Robinson H. B. Houghton, J. F. Houghton, John Thomas, James Menzies, Geo. Woodward, Mrs. Anna Jenkins, O. B. Dolly and wife, M. A. Pasetta, B. L. Jones, M. Willoughby, W. H. Thomas, John Powning, Sol Babb and wife, Geo. Hake, G. E. Cook, Frank Meffley, Geo. Maxwell, Robt. Penman, L. Cipriotto, Henry Doney, Frank Tucker, H. S. Dunn, William Littecott, John Creighton, F. Vanzini, Edward Mitchell, William Gallagher, A. Grazier, H. Perin, M. Curtis, E. Stephens, J. Moni, L. Grondoni, the said action be dismissed and that they do have and recover of the plaintiff their costs and disbursements necessarily disbursed herein, taxed at—dollars.

Judgment entered this 31st day of October, 1891.

L. S. B. Sawyer, Clerk.

[SEAL.]

A true copy. Attest.

L. S. B. SAWYER, *Clerk*.

Endorsed: Filed October 31, 1891.

L. S. B. Sawyer, clerk.

[Here follows pages 36 to 41 inclusive, in original record containing additional findings and judgment on additional findings in favor of plaintiff against other parties, not parties to this writ of error, and which are omitted from this printed record pursuant to stipulation.]

Certificate to Judgment-Roll.

42 (Title of court and cause.)

I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above entitled action.

Attest my hand and the seal of said Circuit Court this 31st day of October, 1891.

[SEAL.] L. S. B. SAWYER, *Clerk*.

Endorsed: Judgment-roll filed October 31, 1891.

L. S. B. Sawyer, clerk.

Bill of Exceptions.

43 (Title of court and cause.)

Be it remembered that the above entitled cause was submitted to the Court upon facts, exhibits, documentary and other evidence stipulated between plaintiff and the defendants, represented by Messrs. Goodwin & Goodwin, pursuant to the following stipulation which was filed in said cause on the 28th day of April, 1890.

(Title of court and cause.)

"It is stipulated that the controversy between plaintiff and "defendants, represented by Goodwin & Goodwin, be sub-"mitted for decision as far as respects said defendants and

" each of them upon the following agreed statement of facts:
" It is agreed that plaintiff holds whatever title to the
" premises in controversy was acquired by the patent of the
" United States to the Mammoth Gold Mining Company, a
" certified copy of which patent is attached to and made part
" of the complaint in the action of Wm. H. Lakin, vs. The
" Sierra Buttes Gold Mining Company, in the Circuit Court
" of the United States, Ninth Circuit for the District of Cali-
" fornia, No. 2693, which copy of said patent and the
44 " judgment-roll in said action are hereby referred to and
" made part of this agreed statement of facts; subject to
" the objection of defendants that the said judgment-roll is not
" competent proof as against the defendants except as a con-
" veyance; that said patent and the portion of said patented
" premises awarded by the judgment in said action to Wm.
" H. Lakin includes the premises in controversy in this action.
" It is further agreed that plaintiff's Exhibit No. 1, on file in
" said action, which is hereby referred to, correctly shows all
" the proceedings had upon the application for said patent, and
" is made part of this agreed statement of facts, subject to the
" objections of plaintiff that it is not competent for defendant
" to use any part thereof for the purpose of assailing the
" validity of said patent. Said exhibit shows correctly all the
" notice which was given of said application. It is further
" agreed that any and all exhibits and testimony on file in said
" action of Wm. H. Lakin vs. The Sierra Buttes Gold Min-
" ing Company may be taken and considered as if offered in
" evidence in this cause, subject to the objection that any par-
" ticular exhibit or evidence used and referred to by either
" party is irrelevant, immaterial and incompetent.
" It is agreed that the lands in dispute are situated in the
" Jamison Quartz Mining District in Plumas county, State of
" California, and that defendants are to procure and file, as
" an exhibit on their part, a written or printed copy of the
" mining rules adopted in said District prior to 1867, authen-
" ticated by affidavits taken *ex parte*, or may file *ex parte* affi-
" davits showing their contents and date of adoption by
" persons who will depose that they have seen such written or
" printed rules and know their contents of their own knowl-
" edge, and showing that said rules were lost or de-
45 " stroyed, and when and how said loss or destruction
" occurred, subject only to the objection of plaintiff
" that any proof of said rules is irrelevant, immaterial and in-
" competent, and that said affidavits do not conform to this

" agreement, and that plaintiff may file counter affidavits as to " the contents of said rules, subject to the same qualifications " and objection as an exhibit on the part of plaintiff, if desired.

" It is further agreed that defendants are to procure and " file, as an exhibit on their part, a certificate of the County " Recorder of Plumas or Butte county, showing the character " of all lode locations in said District prior to 1868 in respect " to the number of feet along the lode claimed by each claim " and the extent of surface, or that no surface was claimed in " the notice of location, said certificate to be taken as evidence " of the custom of miners in said District, subject only to the " objection that any proof of such custom is irrelevant, imma- " terial and incompetent, it being further agreed that if plain- " tiff desires to furnish a supplemental certificate of said Re- " corder showing locations of lodes in said District prior to " 1868, not included in defendants' certificate, the same may " be filed as plaintiff's exhibit.

" It is agreed that the town of Johnsville has now and for " more than ten years last past has had a population of about " two hundred persons; that during said time it has been laid " out into streets and lots and used by said population as a " trade or business center for the surrounding country; that " a plat of said town was surveyed in the summer of 1889, by " A. W. Keddie, and filed with the county recorder of Plumas " county, and that a correct copy of said plat is attached to

" the answer in this cause; that the land occupied by
46 " said town is not within one thousand feet of the lode
" line, as described in the patent to plaintiff's grantor,

" and that the greater part thereof is not within two hundred " feet of Jamison creek; that the said lode line of the 2,000 " feet extension of the Mammoth Ledge claimed by plaintiff, " has never been opened or developed, and that the actual " trend of said extension of the lode upon the patented ground " is not known, but that developments in the working of the " 2,100 feet of the Mammoth Ledge still held and worked by " the Sierra Buttes Company in a northeasterly direction to a " point about 500 feet southwest from the southwest end of " the said extension, indicate an actual trend of the lode, " which, if continued in the same direction northeasterly " through the plaintiff's part of the patented premises, would " pass through the village of Johnsville, this latter fact being, " however, agreed to subject to the objection of defendants " that it is irrelevant, immaterial and incompetent.

" It is further agreed that the land described in the com-

" plaint, and upon which the said town is situated, has never " been sectionized by the Government of the United States " nor in any manner surveyed by the Government other than " by the survey made in proceedings to obtain the patent to " the Mammoth Quartz Mine, under which plaintiff claims " title, and is mineral land.

" It is further agreed (subject to the objection of plaintiff " that the facts are irrelevant, immaterial and incompetent to " be received as evidence) that there was but one notice of " location of the 2,000 feet extension of the Mammoth Ledge, " which is the notice dated November 4, 1865, and filed as " one of the exhibits above referred to in the case of Lakin
" vs. The Sierra Buttes Gold Mining Company, and
47 " that no definite claim of surface was made in connec-
" tion with said location until a survey was made, upon " which the application for a patent is based, and that no loca- " tion of surface was recorded upon the records of Plumas " county prior to said patent.

" It is further agreed that one John Banks entered upon a " portion of said premises at the date of the record of the " claim or claims made by him and recorded upon the records " of Plumas county, a duly certified copy of which claim or " claims is to be procured by defendants and filed as an ex- " hibit on the part of defendants in this action, subject to the " objection of plaintiff that the same is irrelevant, immaterial " and incompetent, and that thereafter the claim or claims of " said Banks passed by mesne conveyances to a portion of " said defendants; certified copies of which mesne convey- " ances are to be procured by defendants and filed as an ex- " hibit for defendants, subject to the same objection. It is " further agreed that subsequent to the date of said patent " the defendants, A. Curtis, Joseph H. Fletcher, D. Robinson, " M. Willoughby, John Willoughby, O. B. Dolly, H. S. Dunn, " J. H. Bacher, John Daly, S. Soracco, A. Grazier, Mrs. M. " Kerr, and the grantors of defendants, B. F. Jones, successor " to Joseph H. Fletcher, Antonovich, M. A. Passetta and " John Neville, paid a small sum as rent to the Sierra Buttes " Gold Mining Company for the privilege of occupying said " premises, to wit, in the year 1883; that the remainder of " said defendants entered upon the premises occupied by " them upon said patented land since the year 1883, some of " them with the express permission of said Sierra Buttes " Company, and the remainder who did not ask permission,

" entered with the understanding that said Sierra Buttes
48 " Company did not object to occupation of village lots,
" provided its use and enjoyment of the patented prem-
" ises was not interfered with.

" That said patent was issued to the Mammoth Gold Min-
" ing Company, May 18, 1877; that said patented premises
" were conveyed by said patentee to the Plumas Eureka Min-
" ing Company, December 11, 1877, and by said Plumas
" Eureka Mining Company to the Sierra Buttes Mining Com-
" pany, December 26, 1877; that the whole of said patented
" premises were assessed for taxes each year from 1878 to 1888
" inclusive to the said Sierra Buttes Gold Mining Company,
" which paid all taxes assessed upon said land for each of said
" years; that said defendants were assessed for each year
" since 1883, only upon the improvements listed by them
" upon the portion of said patented premises occupied by
" them, said assessments describing said improvements, as set
" forth in a certificate of the County Recorder of Plumas
" county, to be procured and filed in this action by defendants
" as exhibit, showing the description contained in said assess-
" ments for each of said years; and that said defendants paid
" the taxes so assessed to them for each of said years.

" That in the spring of 1889 the plaintiff, after he had ac-
" quired his said judgment against the Sierra Buttes Gold
" Mining Company, enforcing a trust in the portion of said
" patented premises, which includes the premises in contro-
" versy, notified the defendants that they must either pay rent
" to plaintiff for the portion of said land occupied by them, or
" purchase said land, or quit the said premises and remove their
" improvements therefrom within thirty days from the date of
" said notice; but that said defendants neglected and refused
" to do either of said requirements, and still remain in posses-
" sion of the premises described in their answer.
49 " It is agreed that quartz miners of Jamison District,
" who opened and worked mines on Eureka Mountain,
" actually occupied such portion of public land as they chose
" for the purpose of working their mines, the extent of such
" occupation not being a matter of defined custom, but of
" actual possession; but that there was no actual possession
" of the land on which the village of Johnsville is situated, ex-
" cept the road leading across the same from the Mammoth
" Mine to the Mammoth Mill and to Jamison City. The fore-
" going facts being objected to by defendants as irrelevant,
" immaterial and incompetent.

" It is agreed that all the exhibits filed in the case of Wm. " H. Lakin vs. O. B. Dolly, on the motion of plaintiff to vacate " the verdict and judgment and to grant a new trial in that " case, shall be taken and considered as if filed in this case, " and that only such exhibits as are peculiar to the defendants " in this case need be filed herein, and that all the provisions " of the agreement in said case in respect to time of filing ex- " hibits are applicable to this case.

" It is further agreed that this cause shall be brought on for " hearing upon this submission by either party after all ex- " hibits shall have been filed ten days after service of notice " of said hearing; but that there shall be no oral argument " upon said hearing unless both parties are present, but the " final submission, in the absence of either party, shall be " upon briefs to be filed by the parties within such time as " may be agreed upon or allowed by the Court; and that the " time for the hearing of both causes shall be fixed upon the " same day,

" Dated April 28, 1890.

" H. L. GEAR,

" *Attorney for Plaintiff.*

" GOODWIN & GOODWIN,

" *Attorneys for Defendants represented by them.*"

50 The record, exhibits and documentary and other evidence appearing in the case of Wm. H. Lakin vs. The Sierra Buttes Mining Company, referred to in the foregoing agreed statement of facts, shows in substance that in July, A. D., 1851, an association of persons, composing what was called the Mammoth Company, located 2,100 feet of a quartz ledge on Eureka Mountain in Jamison Mining District, Plumas county, California, claiming that portion of the ledge, with all of its dips, spurs and angles, but not specifying any claim of surface adjacent to the ledge; that at the time of said location, the Company located and recorded in their records a claim of a tract of land on Jamison creek, which flows in a valley at the westerly base of the mountain, claiming three hundred yards on each side of Jamison creek, and eight hundred yards in length along the creek for mill privileges and for the timber it contained for the purpose of working the mine, and thereafter built a mill on this tract, between the ledge and the creek, run tunnels on the westerly slope of the

mountain and constructed a wagon road and tramway extending from the tunnels to the mill, across what is now the site of the village of Johnsville, which lies between the old mill and the lode line, and is situated on a flat at the base of the mountain, the site of the present village beginning about 1,000 feet easterly from the Mammoth lode line, and extending about 700 feet in width toward Jamison creek to a line about 200 feet distant therefrom.

That on November 4, 1865, the then owners of the original Mammoth claim, James M. Thompson and John B. McGee, with eight other persons, under whom they afterwards claimed title, located a northeasterly extension of 2,000 feet of said Mammoth lode, with its dips, spurs and angles, but did not specify in their notice of location any additional claim of surface ground. The actual direction of said extension of said lode was obscured, and was not known at the time of said location, or at any time thereafter, farther than as has been indicated by the workings in the original Mammoth ledge, and the general direction of the foot wall rock.

51

That on the 26th of August, 1867, said Thompson and McGee procured one D. D. Brown, a United States Deputy Mineral Surveyor to make for them a survey of said 4,100 feet of lode line and 252 and 95–100 acres of surface ground, including a strip of ground 50 feet northwest of the lode line as located, and a tract of land lying southerly and easterly therefrom, extending to and across Jamison creek, and also including the original Mammoth Mill site claim on both sides of the creek. The said survey included the whole of the present site of Johnsville, no part of the village being then in existence, and included all of the land in controvery in this action. Said surveyor located and marked monuments upon the land surveyed for the boundaries thereof, and said survey was made as the basis of an application for a patent for said land, by said Thompson and McGee, and was afterwards approved by the surveyor-general, as the final survey of said land for which a patent was issued for the whole of the land so surveyed.

That on the 30th day of August, 1867, said Thompson and McGee posted in a conspicuous place on said land, a diagram of said survey, attached to a notice bearing that date and stating "that they intend to apply for a patent for the vein or "lode set forth in the above diagram called the Mammoth "quartz claim, situated in the Jamison Mining District,

" County of Plumas, California, and now post this notice in a
" conspicuous part thereof."

52 That on the 7th day of September, 1867, said McGee and Thompson caused to be published in the Plumas *National*, a weekly newspaper, published in said County of Plumas, the following notice:

" The undersigned give notice that they intend to apply
" for a patent for the vein or lode known as the Mammoth
" quartz claim, situated in the Jamison Mining District,
" County of Plumas, State of California, and now post this
" notice on a conspicuous part thereof; commencing at an
" iron pin drilled into a rock on the line dividing the Mam-
" moth claim from the Eureka claim, and running thence for
" the center of the vein northeast 4,100 feet, and including
" the land between the lode and Jamison Creek for working
" purposes.
" Dated on the ground this 30th day of August, 1867.
" JOHN B. McGEE.
" JAMES M. THOMPSON."

And they caused such publication to continue for ninety days thereafter.

Exhibit No. 1, on file in the action of Wm. H. Lakin vs. The Sierra Buttes Gold Mining Company, referred to in the agreed statement of facts in this cause, is an exemplified copy of all the proceedings had in the Land Department of the United States, upon which was based the patent under which plaintiff claims title to the premises in controversy, and it appears from said Exhibit No. 1 that on the 11th day of September, 1867, said Thompson and McGee made application to the Land Office at Marysville for a patent for the lode and land included in said diagram of survey under the Act of Congress of July 26, 1866, alleging that they were the present owners of the Mammoth quartz claim in the Jamison

53 Mining District, County of Plumas, and State of California, and that as an association of persons they had theretofore occupied and improved the same in accordance with the local customs and rules of the mines in said District, and had expended in actual labor and improvements thereon an amount not less than one thousand dollars, that there was no controversy within the petitioner's knowledge as to said claim; and further alleging that they therewith presented a diagram of said mining claim so extended as to conform to

the rules of said mining district, and making other allegations as required by said Act of Congress, and requesting in said application that the Register of the Land Office for the Marysville District do publish according to said Act, a notice of their intention to apply for a patent in the Plumas *National*, a paper published at Quincy, in the County of Plumas, California, being a paper published nearest the the location of said claim; and that on said 11th day of September, 1867, the Register of said Land Office made an order that the notice of said intention to apply for a patent be published for ninety days in said Plumas *National*.

Said Exhibit No. 1 further shows that on the 27th day of February, 1877, the Register of said Land Office certified to said surveyor-general, "in relation to the application No. 27 "of J. B. McGee and James M. Thompson for patent to "Mammoth Mining Claim, situated in Plumas County, Cali- "fornia," "that the records and files of this office show that the "above application No. 27, for a patent to said mining claim, "together with a copy of the diagram and notice thereof, were "filed in this office on the 11th day of September, 1867; that "on the same day the copy of said notice and diagram were "duly posted in this office, and remained so posted for the
"period of ninety consecutive days; that said notice and
54 "diagram were duly posted on said claim on the 30th
"day of August, 1867, and remained so posted for "ninety consecutive days; that upon the order of the Regis- "ter of this office, a copy of said notice was duly published in "the Plumas *National* for said period of ninety days, the same "being a newspaper published at Quincy, in Plumas County, "State aforesaid; that no claim exists against the United "States Government for the cost of said publication, all "claims therefor having been waived by an agreement duly "filed with such application;" and "that no adverse claim to "any portion of said mining claim has been filed in this office."

Said Exhibit No. 1 further shows that on the 2nd day of March, 1877, said Surveyor-General returned to said Land Office his first survey of the premises applied for, that which was designated by said Surveyor-General as Lot No. 44, and which certified to the said Land Office that the attached field notes of the preliminary survey of the mining claim, known as the Mammoth Quartz Mine, claimed by John B. McGee and James M. Thompson, executed by D. D. Brown, U. S. Deputy Mineral Surveyor, in the month of August, 1867, were adopted as the final survey of said premises; that the

field notes and report of said preliminary survey of said D. D. Brown, attached to said certificate of said surveyor-general, certified that on the 28th day of August, 1867, there were three tunnels on the claim, designated as the "upper," "middle" and "lower," that there was a mill for reducing the rock on Jamison Creek, worked by water in a ditch taken from the creek, and that there was plenty of timber near the mill for all purposes; that said Exhibit No. 1 further shows that
55 on the 2nd day of March, 1877, the Mammoth Gold Mining Company, by Wm. Letts Oliver, its secretary, filed in said Land Office an affidavit of said Wm. Letts Oliver, stating in substance that said Company became the purchaser of said Mammoth Quartz Lode, June 7, 1870, and went into possession of the same and of all the surface ground included in the application of said Thompson and McGee for a patent, and have remained in the continuous occupancy and possession thereof from that date and had caused tunnels to be run and valuable improvements erected at an expenditure of not less than $50,000. Said Exhibit No. 1 further shows that on the 3rd day of March, 1877, one R. M. Wilson filed in said Land Office an affidavit taken before the register of the Land Office, who certified that said affiant was a credible and respectable person, which affidavit stated that the affiant was a Deputy Mineral Surveyor for the State of California, and within the line of his official duties had within the last twelve months, prior to said date, made diligent search and inquiry in the old Jamison Mining District, Plumas County, California, for missing records and mining rules and regulations for that District, but was unable to find any and that he believed that neither records or mining rules or regulations existed there at that time, and further believed that none had been in existence in said District for many years that everything relating to mines or mining claims, that have become a matter of record since 1870, has been recorded in the County Recorder's office for said County of Plumas. Said Exhibit No. 1 further shows that there were filed in said Land Office by said Mammoth Gold Mining Company certain conveyances
56 in support of its claim of title to said Mammoth Mine as the successor in interest of said Thomas and McGee, a copy of its certificate of incorporation, and an abstract of the records of Plumas County certified by the County Clerk, showing the state of said records, as affecting the title to said mine, and that there was no pending litigation concerning it; and that on the 17th day of March, 1877, said

Mammoth Gold Mining Company, a corporation, was allowed to purchase and enter said "Lot No. 44," and that on that date the following certificate of entry was made and issued to said Mammoth Gold Mining Company.

"REGISTER'S FINAL CERTIFICATE OF ENTRY.

"Mineral Entry No. 62 } U. S. Land Office at Marysville, Cal.
"Lot No. 44. } 17th March, 1877.

"It is hereby certified that in pursuance of the Mining Act "of Congress, approved July 26, 1866, the Mammoth Gold "Mining Company, (a corporation) (assignee or successor in "interest of John B. McGee and James M. Thompson), whose "postoffice address is San Francisco, California, on this day "purchased that mineral claim or lot of land of Section in "Township No. 22, North of Range 11 E. Mt. Diablo Base "and Meridan, situate, lying and being in the Jamison Min-"ing District, in the County of Plumas and the State of Cali-"fornia, known as Mammoth Quartz Mining Claim, embrac-"ing 4,100 linear feet of the Mammoth Quartz Mining "Claim, vein or lode, with 252 and 95-100 acres of sur-"face ground, as shown by said survey, for which the said "Mammoth Gold Mining Company has this day made pay-"ment to the Receiver in full, amounting to the sum of "Twelve Hundred and Sixty-five ($1265) Dollars. Now,
"therefore be it known, that upon presentation of this
57 "certificate to the Commissioner of the General Land
"Office, together with the plat, survey and description "of said claim, a patent shall issue thereupon, if all be found "regular.

"CHAS. M. PATTERSON, *Register.*"

The patent referred to in said agreed statement of facts recites that "In pursuance of the provisions of the Revised Statutes "of the United States, Chapter six, Title Thirty-two, there "have been deposited in the General Land Office of the "United States the plat and field notes of survey of the claim "of the Mammoth Gold Mining Company upon the Mam-"moth Quartz Mine, accompanied by the certificate of the "Register of the Land Office at Marysville in the State of "California, whereby it appears that in pursuance of said

" Revised Statutes of the United States, the Mammoth Gold " Mining Company did, on the seventeenth day of March, " A. D. 1877, enter and pay for said mining claim or premises, " being mineral entry No. 62, in the series of said office " designated by the Surveyor-General as Lot No. 44," giving the contents and metes and bounds of said survey in full; and purports " In consideration of the premises, and in conform- " ity with the said Revised Statutes of the United States," to grant to said Mammoth Gold Mining Company and to their successors and assigns the said mining premises hereinbefore described in Lot No. 44, etc., including 4,100 feet of the said Mammoth Quartz Mine, vein, lode, ledge or deposit, and also "of all other veins, lodes, ledges or deposits, throughout " their entire depth, the tops or apexes of which lie inside the " exterior lines of said survey."

All of the title of said Mammoth Company in said
58 patented premises passed by mesne conveyances to the Sierra Buttes Gold Mining Company, and it appears from the judgment roll in the said action referred to in said agreed statement of facts, that the title of the plaintiff to the premises claimed by him was obtained through the enforcement of a trust by said plaintiff Wm. H. Lakin, against said Sierra Buttes Gold Mining Company, in said action by the judgment of this Court rendered therein on the 19th day of November, 1888, whereby and in pursuance of which there was set off and conveyed to said Wm. H. Lakin, as part and parcel of said patented premises the land and premises described in the complaint in this action.

Pursuant to said stipulation the defendants filed as exhibits to be used in this action on their part the affidavits of John S. Graham, J. D. Byers, Geo. Woodward, Sol Babb, John P. Hills, and A. Jump, each stating in substance that the original mining rules adopted by the miners of Jamison Mining District, were destroyed by fire in the year 1862; that rules in writing for said District were adopted at a meeting of miners in 1851, and that the affiant was familiar with said rules. The affidavit of John S. Graham states that the rules originally authorized each person to locate not to exceed 30 feet on a quartz ledge or lode, and not to exceed 250 feet on each side of said 30 feet of ledge located, and that the rules were subsequently changed so as to limit the location of a quartz claim to twenty feet along the ledge including the dips, spurs, and angles. The affidavit of J. D. Byers states that the size of quartz claims required by the laws adopted

in 1851 was twenty feet to each man along the course of the ledge including the dips, spurs, and angles; that he could not remember the exact amount of surface ground
59 authorized to be located on each side of a lode claim, but is certain it did not exceed 100 feet on each side of the lode or vein located. The affidavit of Geo. Woodward states that said written rules adopted in 1851, authorized each person to locate not to exceed thirty feet along the line of the lode or ledge, with all of the dips, spurs and angles of the ledge, and to hold surface ground on each side of the ledge or vein not to exceed one hundred feet. The affidavit of Sol. Babb states that the rules originally authorized each person to locate not to exceed thirty feet on a quartz ledge or lode, and not to exceed one hundred feet on each side of said thirty feet of ledge located, and were subsequently changed so as to limit the locator of a quartz claim to twenty feet along the ledge, including the dips, spurs and angles. The affidavit of John P. Hills states that said written laws originally authorized each person to locate twenty feet along the lode or vein; that he did not remember definitely the amount of surface ground on each side of the lode which each claimant could hold, but is certain that the rules did not authorize the location of more than one hundred feet on each side of the ledge, and knows of no change authorizing any greater amount of surface ground. The affidavit of A. Jump states that in 1851 and 1852 he had in his possession a copy of the local rules and records of Jamison Mining District, and became well acquainted with them, and the said rules authorized each miner to locate not to exceed 20 feet on a quartz ledge or lode including the dips and angles thereof. This last affidavit appears to have been prepared in blank by some other person before the filling up of the same and signature thereof by said Alemby Jump, and the following words are erased therefrom "and not to exceed feet on each side of said feet of ledge so located." The plaintiff filed as counter-exhibits on his part the affidavits of James M. Thompson, John B. McGee, John McBeth, M. D. Howell, J. M. Miller
60 and C. W. Bush, each stating in substance that the affiant was familiar with the laws adopted by the miners of Jamison Mining District in 1851, and that the same contained no provision in regard to the amount of surface ground which might be occupied by the locator of a quartz ledge; that such locators were allowed to occupy and use any surface not previously occupied by others for the purpose of working

their claims, and that gravel claims only were limited by said laws to 100 feet in breadth of surface; and that the laws adopted were disregarded shortly after their passage. The affidavits of James M. Thompson, John B. McGee and John McBeth further state that the owners of quartz mines in the vicinity of the Mammoth, as well as the Mammoth Company occupied surface for working purposes for a distance of more than 1,000 feet from the vein. The affidavit of James M. Thompson further states that at the time of the location of the Mammoth Extension of 2,000 feet in 1865 he made diligent inquiry as to the existence of miner's rules in said District at that time, and then ascertained that the old laws had been disregarded, and that no laws relating to the location of quartz or placer claims in said District were then in existence. The affidavit of John McBeth further states that he was one of the locators of the original Mammoth Quartz Claim; that the Eureka claim was first located 30 feet to the man along the vein; that the Seventy Six Company then passed laws limiting the claim to 20 feet along the vein, but the Mammoth Company was subsequently located and claimed 30 feet to the man, and the provisions of the laws as to the length of vein were not enforced after 1852. The affidavits of C. W. Bush and J. M. Miller further state that they were members of the Eureka Company which was the first quartz claim located in Jamison Mining District and were locators of said claim in 1851, which claimed 30
61 feet of vein to each locator; that the Seventy Six Company was afterwards formed and subsequently the Mammoth; that the Seventy Six Company claimed that the Eureka Company had taken up too much vein, and attempted to pass laws in which the Eureka Company took no part, making a quartz claim 20 feet in length along the vein; that the Eureka Company never acknowledged the laws adopted by the Seventy Six Company and they soon became a dead letter.

Pursuant to said stipulation, defendants filed as an exhibit on their part, a certified abstract of all lode locations made in Jamison Mining District, and recorded upon the records of Plumas County prior to 1868, as evidence of the custom of miners in said District as to extent of vein and surface claimed by locators of ledges therein; and that said exhibit shows that in the year 1856 two locations were recorded, one by three persons claiming 125 feet of the lode with its dips, spurs and angles, without mention of surface,

and the other by five persons claiming 275 feet "embracing all the dips and angles of the ledges together with surface ground necessary to work the ledge." In 1859 eight locations were recorded, the first four making no mention of surface ground and claiming 100 feet of ledge to each locator along the ledge, with its dips, spurs and angles. The other four were locations of 200 feet of ledge to each locator with one claim for discovery, claiming the ledge with all its dips, spurs, angles and branches to the width of 500 feet. In 1860 eight locations were recorded, one by fourteen claimants of 3,000 feet of ledge without mention of surface ground, the other seven being at the rate of 100 feet of vein to each locator, including all dips, spurs and angles of the ledge, four of them making no mention of surface, two others calling for "sufficient ground on either side for fully developing
62 and working the same," one other containing the words "together with all necessary appurtenances thereto for working and developing the ledge," one calling simply for appurtenances" and the remaining one of the eight containing the words "together with all appurtenances necessary for developing the ledge." In 1862 three locations were recorded, two of them by locators claiming at the rate of 100 feet each, and the third by eleven locators claiming 25,000 feet of ledge, all three locations claiming all dips and angles of the ledge without mention of surface ground. In 1863 two locations were recorded, one by seven locators claiming 100 feet and all quartz lodes within 125 feet of the ledge "and "sufficient ground upon each side thereof for the convenience "of working the same;" and one by thirty locators of 3,000 feet of ledge and all quartz veins within 125 feet; "also all "the land, wood and water within twenty rods of the said "ledge." In 1864 one location was recorded by fifteen persons of 2,000 feet of ledge, "with all dips, spurs and angles of the same" with no mention of surface ground. In 1865 six locations were recorded, three of them making no reference to surface ground, two claiming 200 feet, and one claiming 100 feet on each side of the ledge. Two of them claimed 100 feet of vein to each locator, and the other four claimed 200 feet of vein to each locator, one of these being the Mammoth Extension claim of 2,000 feet located by James M. Thompson, John B. McGee and eight others. In 1866 two locations were recorded, one by five locators claiming 1,200 feet of ledge, with all its dips, spurs and angles, without mention of surface ground, and the other by six

locators claiming 200 feet each, with 150 feet of ground on each side of the ledge.

Pursuant to said stipulation the defendants filed as
63 an exhibit a certified copy of the recorded claim of John Banks, which shows that on the 20th of June, 1876, said John Banks recorded upon the records of Plumas County a notice of a claim of twenty acres of land "for building and "agricultural purposes" and described as follows: "Com- "mencing at a certain spruce tree situated on the west bank "of Jamison Creek on the N. E. line of the Mammoth Mill "ground, thence along said line in a N. W. direction to the "base of the mountain; thence in a N. E. course along the "base of the mountain ninety yards; thence in a S. E. course "by a large cedar and a dead pine tree to the brow of said "flat; thence up the brow of said flat to the place of begin- "ning." The defendants filed no exhibits showing any conveyance from said John Banks to any person, and filed no exhibit or exhibits on their part showing the mode in which taxes on improvements were assessed to the defendants.

This bill of exceptions incorporates the substance of all exhibits, documents and evidence referred to in said agreed statement of facts in said stipulation, and said stipulation was complied with as to the time and manner of filing exhibits except as above stated, and as to the submission of said cause.

Upon the hearing and consideration of said cause the Court overruled the objection of plaintiff that any proof of the mining rules of Jamison Mining District adopted prior to 1867 was irrelevant, immaterial and incompetent, and admitted and considered evidence of said rules in the decision of said cause, to which ruling plaintiff duly excepted.

The Court also overruled the objection of plaintiff that
64 any proof of the custom of miners in said district was irrelevant, immaterial and incompetent, and admitted and considered evidence of said customs in the decision of said cause, to which ruling plaintiff duly excepted.

The Court also overruled the objections of plaintiff to the certified copy of the claim of John Banks; that the same was irrelevant, incompetent and immaterial, and admitted and considered evidence of said claim in the decision of said cause, to which ruling plaintiff duly excepted.

The Court filed its findings of fact and rendered judgment herein on the 31st day of October, 1891, and plaintiff served a draft of his proposed bill of exceptions on Goodwin and

Goodwin, attorneys for said defendants by mail on the 7th day of November, 1891.

The plaintiff specifies and assigns the following errors of law committed by the Court in the trial and decision of said cause.

1st. The Court erred in overruling the objection of plaintiff to proof of the mining rules of Jamison Mining District.

2nd. The Court erred in overruling the objection of plaintiff to proof of the custom of miners in said District.

3rd. The Court erred in overruling the objection of plaintiff to proof of the claim of John Banks.

4th. The decision of the Court is against law in allowing the patent under which plaintiff claims title to be assailed by the defendants in this action.

5th. The decision of the Court is against law in holding that said patent is void as to any of the land occupied by the defendants, or as to any part of the premises therein described.

6th. The decision of the Court is against law in holding that at the time this action was commenced plaintiff did not own, or was not entitled to the possession of the land occupied by the defendants.

65

7th. The decision of the Court is against law in deciding that as to any of the said defendants the said action should be dismissed, and in awarding judgment to any of them for their costs and disbursements.

Plaintiff also specifies the following particulars wherein the evidence is insufficient to justify the decision of the Court.

1st. Neither the evidence nor the agreed statement of facts justifies the finding or decision by the Court "that there "was not at any time prior to 1868, any law, usage or custom "in force in Jamison Mining District authorizing the location "or occupancy of more than 100 feet of surface ground on "each side of the lode located," but the evidence and the agreed statement of facts show the contrary facts to be true, and conclusively show that Thompson and McGee at the time of their application for a patent in 1867 had theretofore occupied and improved the premises applied for in accordance with the local customs and rules of the miners in said District; and that there was then no controversy as to their claim to the whole of said premises; and that there was then no

mining rule or custom in force precluding their occupancy of the whole thereof or their application for a patent for the whole of said premises or the granting of a patent for the same.

2nd. Neither the evidence nor the agreed statement
66 of facts justifies the finding or decision of the Court that "no surface ground was claimed along the line of "said Mammoth lode" or the implied finding or decision that no surface ground parallel to said lode was claimed by the locators thereof; but they show on the contrary that the locators of said Mammoth lode claimed and located a tract of land parallel with said lode and including Jamison Creek, for working purposes, about the time of the location of said lode which claim included said creek and three hundred yards upon each side thereof within the limits of the patented premises and that they built a mill and claimed and used lumber on said tract for working purposes.

3rd. Neither the evidence nor the agreed statement of facts justifies the finding or decision that there was no possession of the land in controversy for mining purposes prior to the issuance of the patent, but both of them show on the contrary that there was constructive possession of the whole thereof for said purposes before said patent was applied for.

4th. There is no evidence nor any agreed facts to justify the finding that there was a custom in force in Jamison Mining District from 1856 to 1868 to record all notices of mining locations in the office of the County Recorder of Plumas County.

5th. Neither the evidence nor the agreed statement of facts justifies the finding or decision that no other notices than these set out in the 5th finding of fact were posted and published in the proceeding to obtain said patent; but show
on the contrary that said proceedings were regularly
67 conducted in respect to the posting and publication of all notices of the application for said patent.

6th. Neither the evidence nor the agreed statement of facts justifies the finding or decision that McGee and Thompson took no other or further steps to procure a patent for said claim but show on the contrary that they took all the steps necessary to forestall any opposition of any claimant to said premises or any part thereof.

7th. There is no evidence or agreed facts to justify the finding or decision that one John F. Banks on the 17th of June, 1876, entered upon and located twenty acres of land

upon which the town of Johnsville is now situated or to justify the implied finding that said Banks was ever in possession or had the right of possession of any part of the said land, or of any part of the premises in controversy.

8th. There is no evidence or agreed fact to justify the finding or decision that any part of the claim of said Banks passed by mesne conveyances to any defendant or defendants residing in the town of Johnsville.

9th. Neither the evidence nor the agreed statement of facts justifies the finding or decision that plaintiff at the time the action was commenced was not the owner of nor entitled to the possession of the land occupied by the defendants, but they both show on the contrary that plaintiff is and was at the time of the commencement of this action the owner of and entitled to the possession of all the premises described in the complaint of plaintiff herein.

H. L. GEAR,

Attorney for Plaintiff.

The foregoing bill of exceptions is hereby allowed and settled as being correct, Dec. 30th, 1891.

HAWLEY, *Judge.*

68 Endorsed: Service of within received by mail Nov. 10th, 1891.

GOODWIN & GOODWIN.

Filed December 30, 1891. L. S. B. Sawyer, Clerk.

69 *Opinion.*

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

WM. H. LAKIN, Plaintiff,
vs. No. 10,596.
O. B. DOLLY, Defendant.

and

WM. H. LAKIN, Plaintiff,
vs. No. 10,630.
J. H. ROBERTS ET AL., Defendants.

These cases are actions of ejectment. The Dolly case is submitted on a stipulation "That defendant may move to set aside the judgment and for a new trial of the above entitled action without previous service of notice of intention and without showing of facts constituting surprise or excusable neglect as a ground of the motion, it being agreed that if the facts hereinafter stipulated do as matter of law show a right of the defendant to defend the action successfully as against the plaintiff, under the pleadings defendant is entitled to a new trial of said action upon the ground of surprise and excusable neglect, and that if such right so appears the said judgment may be set aside upon condition of the payment of the costs of plaintiff included in said judgment, and the
70 judgment then be rendered in favor of defendant for his costs; but that if said facts do not show such right of successful defense as matter of law the motion of defendant is to be denied, and the verdict and judgment in favor of plaintiff are to be and to remain final."

The Roberts case is submitted by agreement of counsel upon the agreed statement of facts filed in the Dolly case.

From the agreed statement and the various exhibits referred to, the following among other facts are made to appear, viz.—That plaintiff holds the title to the premises in controversy, that was acquired by the patent of the United States to the Mammoth Gold Mining Company; that the lands in controversy are mineral lands and are situated with-

in the Jamison Quartz Mining District in Plumas County, and embrace the land upon which the town of Johnsville is situate; that the patent issued to the Mammoth Gold Mining Company on the 18th day of May, 1877, although it purports upon its face to be issued in pursuance of the Revised Statutes of the United States upon an entry made by the Mammoth Company, March 17th, 1877, was applied for by John B. McGee and James M. Thompson under the law of 1866, on August 30th, 1867; that the patent embraces two separate locations, and conveys 4,100 feet of a gold-bearing quartz lode, with 252.95 acres of land; that the actual trend of the extension of the Mammoth lode upon the patented ground is unknown; that the lode as marked on the patent as well as located and fixed on the surface of the land, is in a straight line along the west or northwest boundary of said patented tract and is within fifty feet of said line; that the surface tract covered by the patent except said fifty feet, is on the
71 east or southeast side of said lode, and extends about three-fourths of a mile therefrom; that the written laws adopted in 1851 by the miners of the Jamison Quartz Mining District, governing the location of quartz claims therein, made no provision for the location of surface ground in connection with quartz location in excess of one hundred feet on each side of the lode; nor was there any law, usage or custom authorizing the location or occupancy of more than one hundred feet of surface ground on each side of the lode; that the "Quartz miners of Jamison District who opened and worked "mines on Eureka Mountain actually occupied such portion "of public land as they chose for the purpose of working "their mines, the extent of such occupation not being a "matter of defined custom, but of actual possession, but "* * * there was no actual possession of the land on "which the village of Johnsville is situated, except the road "leading across the same from the Mammoth mine to the "Mammoth Mill and to Jamison City;" that in 1867 McGee and Thompson procured a survey of the Mammoth claim and extension, and of the exterior boundaries of the surface ground, and had a diagram thereof made, and thereupon, on the 30th day of August, 1867, they posted on said Mammoth claim the following notice: "The undersigned give notice "that they intend to apply for a patent for the vein or lode "set forth in the above diagram, called the Mammoth Quartz "Claim, situated in the Jamison Mining District, County of "Plumas, California, and now post this notice on a conspicu-

"ous part thereof. Dated on the ground, this 30th day of
"August, 1867.
"
" JOHN B. McGEE,
" JAS. M. THOMPSON."

72 That on the 7th day of September, 1867, they published in a local newspaper, for the period of ninety days, the following notice, viz.: "The undersigned give notice "that they intend to apply for a patent for the vein or lode "known as the Mammoth Quartz Claim, situated in the "Jamison Mining District, County of Plumas, California, and "now post this notice on a conspicuous part thereof. Com- "mencing at an iron pin drilled into a rock on the line divid- "ing the Mammoth Claim from the Eureka Claim, and running "thence for the center of the vein northeast 4,100 feet, and "including the land between the lode and Jamison Creek for "working purposes. Dated on the ground this 30th day of "August, 1867.
"
" JOHN B. McGEE,
" JAS. M. THOMPSON."

That on the 17th day of June, 1876, one John F. Banks entered upon and claimed twenty acres of land upon which the town of Johnsville is now situate, and located the same for building and agricultural purposes; that his claim thereto was recorded upon the records of Plumas County prior to the issuance of the patent to the Mammoth Company; that by certain mesne conveyances this tract of land has become vested in the defendants; that for more than ten years last past the town of Johnsville has been the center of trade and business of that section of country, with a population of over two hundred persons, and laid off into streets, lots and blocks; that no portion of this tract of land occupied by defendants is within one thousand feet of the lode described in the patent; that said land has never been sectionized by the Government of the United States, nor in any manner surveyed by the Government of the United States other than by the
73 survey made in the proceedings to obtain the patent to the Mammoth Quartz Lode, under which plaintiff claimed title; that in the summer of 1883, for the first time, the Sierra Buttes Mining Company, from which complainant claims title, demanded of the citizens of Johnsville that they should pay nominal rent to the Company for the land occupied

by them as town lots; that the defendant Dolly, and several of the defendants in the Roberts case, paid from one to five dollars each, and no other or further (or further) payments of rent from them was ever demanded until the spring of 1889; that the other defendants in the Roberts case who entered upon the land subsequent to 1883, either obtained permission of said Company, or entered upon the land with the understanding that the Sierra Buttes Gold Mining Company did not object to the occupancy of the town lots, as long as the enjoyment of its rights in the premises were not interfered with; that the lands embraced in the patent were assessed for State and County purposes from 1878 to 1888 to the mining company, and it paid the taxes thereon; that after 1883 the defendants in the respective actions were assessed for taxes on their respective improvements on the land occupied by them, and the taxes so assessed were paid by them; that in the spring of 1889 the plaitiff, Lakin, after he had acquired a judgment against the Sierra Buttes Gold Mining Company, enforcing a trust in the portion of the patented ground which include the premises in controversy, notified the defendant Dolly and the defendants in the Roberts case, that they must either pay rent for the land occupied by them, purchase said land, or quit the premises, and remove their improvements therefrom within thirty days; that defendants neglected
74 and refused to perform either of said requirements, and remained in the possession of the premises.

Upon the foregoing facts the contention of defendants is, that under the provisions of sections 2318 and 2320, Rev. St. U. S., the patent issued to the Mammoth Gold Mining Company is void as to all that portion of surface ground on the east or southeast side of the quartz lode in excess of 300 feet from the center of the lode. The contention of the plaintiff is, that the Land Department had jurisdiction to pass upon all questions of fact, and to issue the patent; that its action in this respect is conclusive, and cannot be collaterally attacked in an action of ejectment.

I had occasion, in Rose v. Richmond M. Company, 17, Nev. 25; 114 U. S., 576, and in the recent case of Whitney v. Taylor, ——— Fed. R., ———, to thoroughly examine the question as to when, where and under what circumstances, a patent could be declared void, and to determine the extent of the power of the Land Department of the Government of the United States to pass upon and decide jurisdictional facts. The question was referred to and discussed by Mr. Justice Sawyer in

Francoeur v. Newhouse, 40 Fed. R., 623, and has been frequently raised and passed upon in a great variety of cases in the Supreme Court of the United States.

Polks Lessee v. Wendall, 9 Cranch., 87.
New Orleans v. United States, 10 Pet., 662, 730.
Wilcox v. Jackson, Dem. McConnell, 13 Pet., 498, 509.
Stoddard v. Chambers, 2 How., 284, 317.
Easton v. Salisbury, 21 How., 426, 428.
Reichart v. Felps, 6 Wall., 160.
75 Best v. Polk, 18 Wall., 112, 117.
Eleavenworth Railroad v. United States, 92 U. S., 733.
Newhall v. Sanger, 92 U. S., 761.
Sherman v. Buick, 93 U. S., 209.
Smelting Co. v. Kemp., 104 U. S., 636.
Steele v. Smelting Co., 106 U. S., 447.
Kansas Pacific Railway Co. v. Dunmuir, 113 U. S., 629, 642.
Reynolds v. Iron Silver Mining Co., 116 U. S., 687.

The general principles bearing upon this subject are very clearly announced by Mr. Justice Miller, in delivering the opinion of the Court in Doolan v. Carr, 125 U. S., 624, as follows: "There is no question as to the principle that where "the officers of the government have issued a patent in due "form of law, which on its face is sufficient to convey the title "to the land described in it, such patent is to be treated as "valid in actions at law, as distinguished from suits in equity, "subject, however, at all times to the inquiry whether such "officer had the lawful authority to make a conveyance of the "title. But if those officers acted without authority; if the land "which they purported to convey had never been within their "control, or had been withdrawn from that control at the "time they undertook to exercise such authority, then their "act was void—void for want of power in them to act on the "subject matter of the patent, not merely voidable in which "latter case, if the circumstances justified such a decree, a "direct proceeding with proper averments and evidence would "be required to establish that it was avoidable and should "therefore be avoided. The distinction is a manifest one, al-"though the circumstances that enter into it are not always "easily defined. It is nevertheless a clear distinction, estab-
"lished by law, and it has been often asserted in this
76 "Court, that even a patent from the Government of the
"United States, issued with all the forms of law, may be "shown to be void by extrinsic evidence, if it be such evi-

" dence as by its nature is capable of showing a want of au-
" thority for its issue." In the light of the authorities there can be no question as to the duty of this Court to investigate and determine whether or not defendants contention is well founded.

It is claimed by plaintiff that upon the facts of this case, and under the provisions of section 2328 and 5577, Rev. St. U. S., the patent must be considered and treated as having been issued under the Act of Congress of 1866; it is immaterial so far as the result of this decision is concerned, whether the patent is construed with reference to the Act of 1866, or the subsequent provision of the Revised Statutes, under and in pursuance of which the patent purports to have been issued. But I am of the opinion that the question as to the validity of the patent depends upon the construction to be given to section 2320, Rev. St. U. S. This section reads as follows:—
" Mining claims upon veins or lodes of quartz or other rock
" in place bearing gold, silver, cinnabar, lead, tin, copper, or
" other valuable deposits, heretofore located, shall be governed
" as to length along the vein or lode by the customs, regu-
" lations and laws in force at the date of their location. A
" mining claim located after the 10th day of May, 1872,
" whether located by one or more persons, may equal, but
" shall not exceed, one thousand five hundred feet in length
" along the vein or lode; but no location of a mining claim
" shall be made until the discovery of the vein or lode within
" the limits of the claim located. No claim shall extend
77 " more than three hundred feet on each side of the
" middle of the vein at the surface, nor shall any
" claim be limited by any mining regulation to less than
" twenty-five feet on each side of the middle of the vein at
" the surface, except where adverse rights existing on the
" 10th day of May, 1872, render such limitation necessary.
" The end lines of each claim shall be parallel to each other."

This entire section seems to be clear, definite and certain. It provides that all mining claims upon quartz lodes located prior to its passage should be governed as to the length of the claim along the lode "by the customs, regulations and
" laws in force at the date of their location;" that the claims located after the 10th day of May, 1872, " may equal, but shall
" not exceed one thousand five hundred feet in length along
" the vein or lode." So far the section relates solely to the question of the length of the lode that may be located. It next takes up the question as to how much surface ground

will be allowed to the locator of a quartz lode, and says that "no claim," evidently meaning all claims, whether coming within the first clause relating to claims located prior to the passage of this section or within the second clause relating to locations made subsequent thereto—"shall extend more than "three hundred feet on each side of the middle of the vein at "the surface." Having thus expressed the extent of the surface ground to which the locator may be entitled it further provides that the amount of surface ground shall not in any case be limited by any mining regulations to less than twenty-
five feet on each side of the middle of the vein at the
78 surface, except in certain contingencies, which have no application to the facts of this case. After the passage of the act of which this section forms a part, it seems very clear to my mind, that the Land Department had no jurisdiction, power or authority to issue a patent for a quartz lode, to any surface ground exceeding three hundred feet in width on each side of the middle of the vein or lode. And that any patent which is issued for more than that amount of surface ground is absolutely null and void as to the excess over three hundred feet, and can be collaterally attacked in a Court of law.

The principles announced in Smelting Co. v. Kemp, 104 U. S., 636, in so far as the same are applicable to these cases, fully support the conclusions I have reached. There, as herein, the patent was regular upon its face, "unless some "limitation in the law as to the extent of a mining claim "which can be patented, has been disregarded." In the course of an exhaustive and able opinion by Mr. Justice Field, quoting from Patterson v. Winn, 11 Wheat., 380, it is said "that if a patent was issued without authority or was prohib-"ited by statute, * * * it could be impeached collaterally "in a Court of Law in an action of ejectment."

In explanation of the phrase "that if the patent be abso-"lutely void on its face it may be attacked collaterally, im-"peached in a Court of Law," the learned Justice, delivering the opinion of the Court, said, "It is meant that the patent is "seen to be invalid, either when read in the light of existing "law or by reason of what the Court must take judicial notice "of; as for instance * * * that the patent is for an un-"authorized amount." The contention of the defendant in
that case rested upon the correctness of their assertion
79 that a patent could not issue for a placer mining claim which embraced over one hundred and sixty acres.

This contention was sought to be maintained upon the theory that the applicant for a patent could not embody in his application any mining ground that he had purchased from other locators. The Court held that there was no valid reason, and nothing in the language of the acts of Congress which prevented an individual from acquiring by purchase the mining ground located by others and adding it to his own. The views therein expressed are conclusive as to the right of the applicant for a patent to the Mammoth Quartz lode to embrace in their application two or more separate locations owned by them on the same lode.

In Parleys Park Mining Company vs. Kerr, the question was presented whether the patent issued for a quartz lode was void because it embraced more than two hundred feet in width of surface ground. The question thus raised was substantially the same as presented here, but the facts were different. There it was shown that the rules adopted on the 17th of May by the miners of the district where the lode was located, provided, "that the surface width of any mining loca-
"tion shall not exceed one hundred feet in width on each side
"of the wall rocks of said lode." But it also appeared that in anticipation of the Act of Congress of May 10, 1872 (section 2326, Rev. St.), there was a meeting of miners held in said district on the 4th of May, 1872, and the rules of the district were altered and amended so as to provide that "the surface
"width shall be governed by the laws of the United States of
"America," and the Court very properly held that in view of this testimony the Land Department had a right to determine which of these rules were in force. What the result of the opinion would have been if there had been no amend-
80 ment to the mining rules, is made clear by the language of the Court in its reference to the rules and regulations of the miners adopted in 1870, limiting the surface ground to two hundred feet. Upon this point the Court said: "Had
"that regulation remained in existence and been in operation
"at the time the Clara claim was located, its effect upon the
"legality and validity of that location, at least as to all the
"land in excess of two hundred feet could not be doubted."
(130 U. S., 261.)

In the case under consideration the surface ground upon which the town of Johnsville is situated, embracing the lands claimed by defendants, was never possessed or located as a part of the Mammoth Quartz lode and there was no law of the United States at the time the application was made for a

patent in 1867, or when the patent was issued, in 1877, or any State law, or any local rules, regulations or custom of the miners in Jamison Mining District which authorized or permitted any such location to be made. That patent, in so far as it includes any of said ground, was issued without any authority of law, and is therefore null and void.

Does the agreed statement of facts establish such a tenancy between the respective parties as to estop the defendants from denying the title of the plaintiff to the lands in controversy? The general rule that a tenant cannot dispute his landlord's title is too well settled to require any discussion or citation of authorities. This rule, however, is subject to various exceptions and qualifications, equally as important and well established as the rule itself. Among the exceptions are (1) Where the tenant was induced to take a lease by mistake, fraud or misrepresentation on the part of the lessor; (2) Where both parties acted under a mutual mistake
81 as to the law in regard to the title of the lessor; (3) Where the tenant did not take possession of the property under the lease, but was in the possession at the time he took his lease.

Tewksbury v. Magraff, 33 Cal., 341.
Franklin v. Meridia, 35 Cal., 575.
Schultz v. Elliot, 11 Humph., 187.
Hammons v. McClure, 85 Tenn., 85.
Miller v. McBrier, 1 Serg. & R., 382.
Swift v. Dean, 11 Vt., 323.
Carter v. Marshal, 72 Ill., 609.
(Big. Est. Sec. 399, 409, 527; 2 Tay. Land & Ten., Sec. 707; Woods Land & Ten., 364, 374.)

The principles of law relating to these exceptions are elaborately stated, and the reasons given in support thereof are so clearly enunciated in the authorities cited that I deem it unnecessary to discuss this branch of the case at any length. The third ground above stated is the only one upon which there is any dissent. It would probably require, in certain cases, some qualification, and depend, to a great extent, in all, upon the particular facts of each case. But upon the agreed statement of facts in this case, the exceptions mentioned are directly applicable to this case, and, in my judgment, conclusive in favor of the right of defendants to show that the plain-

tiff did not acquire any title to the lands in controversy by virtue of the patent for the Mammoth Quartz lode.

It is certainly clear that the parties have acted under a mistake as to the law in regard to the title of plaintiff. Estoppels are said to be odious in law, as they have a tendency to prevent a full, complete and thorough investigation of the truth, and in order to be operative in any case, ought to be certain to every intent, precise, clear and unequivocal, and not
82 depend upon inference.

The facts agreed to fall far short of establishing the complete relation of landlord and tenant, express or implied, so as to have the effect in law to estop the defendants from asserting the truth. At the time of the commencement of these suits the defendants were in possession of the lands occupied by them under the possessory title, originally acquired by Banks, and although they have no title from the Government of the United States, they are in a position to show that they have a better right to the lands than plaintiff.

If the defendants were simply in the possession as mere naked trespassers, without any question of tenancy being raised, they could in defense of such possession attack the validity of the plaintiff's title, for it has been held by the Supreme Court of the United States that in cases of this character, as in all other cases of ejectment, the plaintiff must recover on the strength of his own title and not upon the weakness of defendants.

Reynolds v. Iron Silver Mining Co., 116 U. S., 688.
Doolan v. Carr, 125 U. S., 688.

The facts agreed upon, with reference to the payment of taxes, are irrelevant and immaterial as they do not establish any title in either party.

In the pursuance of the stipulation and agreement of counsel it follows, from the conclusions reached, as to the law of the case, that in the case of Lakin v. Dolly, the judgment heretofore entered in favor of the plaintiff, must be set aside upon the payment by defendant, of the costs of plaintiff's included in said judgment, and judgment be entered in favor of defendant for his costs. And in Lakin v. Roberts et al.,
83 judgment must be entered in favor of defendants for their costs.

It is so ordered.

HAWLEY, *Judge*.

Endorsed: Opinion read in open Court, March 23, 1891.
L. S. B. Sawyer, Clerk.

(Here follow pages 84 and 85 in the original record containing the partition for writ of error, which is omitted from this printed record pursuant to stipulation.)

Assignment of Errors.

86 (Title of court and cause.)

Plaintiff in error makes the following assignment of errors committed by the Circuit Court in and for the Ninth Circuit, Northern District of California, in the consideration and determination of the action wherein said Wm. H. Lakin is plaintiff and said defendants above named and others are defendants, and which plaintiff in error asks to have received in said Circuit Court of Appeals upon Writ of Error to said Circuit Court.

87 1st. The said Circuit Court erred in rendering judgment in favor of the defendants in error upon the findings and in not rendering judgment in favor of the plaintiff thereupon.

2nd. The Circuit Court erred in overruling the objection of plaintiff to proof of the mining rules of Jamison Mining District and in admitting proof of the same for the purpose of assailing the patent under which plaintiff claimed title. The full substance of the evidence, in regard to said rules, is set out in the Bill of Exceptions in said action, which is hereby referred to and made part of these assignments of errors.

3rd. The Circuit Court erred in overruling the objection of plaintiff to proof of the custom of miners in said District and in admitting said proof for the purpose of assailing the patent under which plaintiff claimed title. The full substance of the evidence, in regard to said custom, is set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

4th. The Circuit Court erred in overruling the objection of plaintiff to proof of the possessory claim of John Banks in support of the possession of the defendants. The full substance of the evidence, in regard to said claim, is set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

5th. The decision of said Circuit Court is against law in allowing the mining patent under which plaintiff claims title

to be collaterally assailed by the defendants in this action.

88 6th. The decision of said Court is against law in holding that said patent is void as to any of the land occupied by said defendants or as to any part of the premises in said patent described.

7th. The decision of said Court is against law in holding that at the time this action was commenced plaintiff did not own or was not entitled to possession of the land occupied by said defendants.

8th. The decision of said Court is against law in deciding that as to any of said defendants that said action should be dismissed and in awarding judgment to any of them for their costs and disbursements.

9th. That said Circuit Court erred in finding as a fact "That there was not at any time prior to 1868, any law, usage "or custom in force in Jamison Mining District authorizing "the location or occupancy of more than one hundred feet of "surface ground on each side of the lode located," and the said finding is not justified by the statement of facts agreed to by the parties nor by evidence, and is conclusively contradicted by the record of the Land Office as to the application and proceedings for the patent under which plaintiff claims. The substance of all the evidence pertaining to said finding of fact is set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

10th. The said Circuit Court erred in finding as a fact that "no surface ground was claimed along the line of the "said Mammoth lode," and the said finding is not justified by the evidence, which shows that the locators of said Mammoth lode claimed and located a tract of land parallel with

89 said lode, and including Jamison Creek, for working purposes, about the time of the original location of said lode, which claim included said creek and three hundred yards on each side thereof within the limits of the patented premises. The substance of all the evidence relating to the location, possession and working of said claims is set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

11th. The Circuit Court erred in finding as a fact that there was no possession of the land in controversy for mining purposes prior to the issuance of the patent under which plaintiff claims title, and the said finding is not justified by the evidence, which shows constructive possession of the whole thereof for said purpose before said patent was applied for.

The substance of all the evidence relating to said possession is set out in said Bill of Exceptions which is hereby referred to and made part of this assignment of errors.

12th. The Circuit Court erred in finding as a fact that there was a custom in force in Jamison Mining District from 1856 to 1868, to record all notice of mining locations in the office of the County Recorder of Plumas County and there is no evidence to sustain or justify said finding. The said Bill of Exceptions contains all the evidence relating to the rules and customs of miners in said district, and is hereby referred to and made part of this assignment of errors.

90 13th. The Circuit Court erred in finding as a fact that no other notices than those set out in the fifth finding of fact were posted and published in the proceeding to obtain said patent, and said finding is contrary to the evidence in regard to said proceeding, all of which is contained in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

14th. The Circuit Court erred in finding as a fact that McGee and Thompson took no other or further steps to procure a patent than those set out in said findings, and said finding is not justified by the evidence, which shows that they took all steps necessary to forstall any opposition by any claimant to said premises or any part thereof, said evidence is fully set out in said Bill of Exceptions, which is hereby re-referred to and made part of this assignment of errors.

15th. The Circuit Court erred in finding as a fact that one John F. Banks on the 17th day of June, 1876, entered upon and located twenty acres of land upon which the town of Johnsville is now situated and said finding is not justified by the evidence; there being no evidence to show that said Banks was ever in possession or has a right of possession of any part of said land, or of any part of the premises in controversy or that he lawfully located the same. All the evidence pertaining to said matters is set out in said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

16th. The Circuit Court erred in finding as a fact that the claim of said Banks passed by mesne conveyances to
91 the defendants residing in the town of Johnsville, and said finding is not justified by the evidence, there being no evidence to support it, as shown by said Bill of Exceptions, which is hereby referred to and made part of this assignment of errors.

17th. The Circuit Court erred in finding that plaintiff, at the time of the commencement of the action, was not the owner of, nor entitled to the possession of the land occupied by the defendants, and said finding is not justified by and is contrary to the evidence, which shows that said plaintiff is and was at the time of the commencement of said action the owner of and entitled to the possession of all of said premises and of all the premises described in the complaint of plaintiff therein.

Wherefore, plaintiff in error prays that the judgment rendered in said action by said Circuit Court on the 31st day of October, 1891, in favor of said defendants in error and against the plaintiff, whereby the said action was dismissed as to said defendants and each at the cost of said plaintiff be reversed by said Circuit Court of Appeals, and that said Circuit Court of Appeals render judgment upon the record in said action in favor of this plaintiff and against each and all of said defendants, as prayed for in his complaint.

H. L. GEAR,
Attorney for Plaintiff in Error.

Endorsed: Filed December 30, 1891.
L. S. B. Sawyer, Clerk.

(Here follows pages 92 and 93 of the original record, containing bond on Writ of Error, which is omitted from this printed record pursuant to stipulation.)

Certificate of Record.

(Title of court and cause.)

I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing ninety-three written and printed pages, numbered from 1 to 93 inclusive, to be a full, true and correct copy of the record and of the proceedings in the above and therein entitled cause, and that the same together constitute the return to the annexed Writ of Error.

In testimony whereof, I have hereunto set my hand and

affixed the Seal of said Circuit Court, this 26th day of January, A. D. 1892.

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Northern District of California.

[SEAL.]

Writ of Error.

UNITED STATES OF AMERICA, ss.

The President of the United States to the Honorable, the Judge of the Circuit Court of the United States for the Northern District of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, between Wm. H. Lakin, plaintiff in error, and J. H. Roberts, W. C. Roberts, M. Kerr and Mrs. Kerr, his wife, P. Laurenzi, John Daly, P. Tivenon, M. Antonovich, J. F. Bacher, John Willoughby, John Nevill, John Knight, A. Curtis, D. Robinson, H. B. Houghton, J. F. Houghton, John Thomas, James Menzies, George Woodward, Mrs. Anna Jenkins, O. B. Dolly and Mrs. Dolly, his wife, M. A. Passetta, B. L. Jones, M. Willoughby, W. H. Thomas, John Powning, Sol. Babb and Mrs. Babb, his wife, Geo. Hake, G. E. Cook, Frank Metfley, Geo. Maxwell, Robert Penman, L. Cipriotto, Frank Tucker, H. S. Dunn, Wm. Littecott, John Creighton, F. Vanzini, Edward Mitchell, Wm. Gallagher, A. Grazier, H. Perin, M. Curtis, E. Stephens, Jack Moni, Henry Doney and L. Grondoni, defendants in error, a manifest error hath happened to the great damage of the said Wm. H. Lakin, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 29th day of January next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that

error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 30th day of December, in the year of our Lord One Thousand Eight Hundred and Ninety-one.

D. MONCKTON,

Clerk of the U. S. Circuit Court of Appeals for Ninth Circuit.

[SEAL.]

Allowed by Hawley, Judge.

Return to Writ.

The Answer of the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mentioned within made, with all things touching the same, we certify under the Seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this Writ annexed, as within we are commanded.

By the Court.

S. B. SAWYER, *Clerk.*

[SEAL.]

Endorsed: Filed December 30, 1891. L. S. B. Sawyer, Clerk U. S. Circuit Court, Ninth Circuit, Northern District of California.

(Here follows citation with admission of service by Goodwin & Goodwin, attorneys for defendants in error and agreement by them to appear, omitted pursuant to stipulation.)

Stipulation as to Printing of Record.

(Title of Court and cause.)

It is hereby stipulated between the parties to the above-entitled cause that the printing of the record on behalf of the plaintiff in error need not include the summons or return thereof, the additional findings and judgment for plaintiff against

certain defendants as to which no errors are assigned or the petition for writ of error, citation, or bond, but need only include the pleadings, findings and judgment for defendants in error, the bill of exceptions, the assignment of errors, and the writ of error and return thereof, and the opinion of the Court below, and that there need be no unnecessary repetition of the Court and cause, and that the pleadings may be stated to be duly verified.

H. L. GEAR,
Attorney for Plaintiff in Error.

GOODWIN & GOODWIN,
Attorneys for Defendants in Error.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

WM. H. LAKIN,

PLAINTIFF IN ERROR,

vs.

J. H. ROBERTS ET AL.,

DEFENDANTS IN ERROR.

Stipulation as to Substitution of Defendants in Error as Representatives of Deceased Defendants.

It is hereby stipulated that the defendants in error, O. B. Dolly, M. A. Passetta, E. Stephens and James Menzies, for whom appearance has been entered herein by Messrs. Goodwin & Goodwin, as their attorneys, are each deceased; that the defendant in error, Mrs. O. B. Dolly, is the duly appointed, qualified and acting administratrix of the estate of said O. B. Dolly, deceased; that Wm. Passetta is the duly qualified, appointed and acting administrator of the estate of said M. A. Passetta, deceased; that no administration has been had upon the estate either of the said E. Stephens, deceased, or of the said James Menzies, deceased, but that Mrs. E. Stephens, the widow of said E. Stephens, deceased, is the sole heir at law of the said E. Stephens, deceased, and Mrs. J. Menzies, the widow of said J. Menzies, deceased, is the sole heir at law of said James Menzies, deceased; and the said Goodwin & Goodwin, who were the attorneys for said decedents, do hereby enter an appearance herein for the said Mrs. O. B. Dolly, as the administratrix and representative of said O. B. Dolly, deceased, in place and stead of said O. B. Dolly, deceased, and for the said Wm. Passetta, as the administrator and representative of said M. A. Passetta, deceased, in place and stead of said M. A. Passetta, deceased, and for said Mrs. E. Stephens, as heir and representative of said E. Stephens, deceased; and for said Mrs. J. Menzies, as heir and representative of said James Menzies, deceased, as defendants in error herein; and it is stipulated by both parties that the said representatives be and they are here-

by substituted as defendants in error in place and stead of said deceased defendants in error.

Dated March 23rd, 1892.

H. L. GEAR,
Attorney for Plaintiff in Error.
GOODWIN & GOODWIN,
Attorneys for Defendants in Error and for said Substituted Defendants.

[Endorsed]: No. 28. Filed April 4, 1893.
F. D. MONCKTON, Clerk.

Order of Substitution of Parties.

At a stated term, to wit: the October Term, A. D. 1891, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the court room in the City and County of San Francisco, on Monday, the fourth day of April, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Matthew P. Deady, District Judge; Honorable William W. Morrow, District Judge.

W. H. LAKIN,
vs.
J H. ROBERTS ET AL. } No. 28.

On motion of H. L. Gear, Esquire, counsel for plaintiff in error, and on filing stipulation of counsel consenting, it is ordered that a substitution of parties defendants in error be allowed in accordance with the terms of said stipulation.

Opinion of Circuit Court of Appeals.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

WILLIAM H. LAKIN,
Plaintiff in Error,
vs.
J. H. ROBERTS ET AL.

Error to the United States Circuit Court for the Northern District of California.

H. L. GEAR, for Plaintiff in Error.
W. N. GOODWIN, for Defendants in Error.

Before McKenna and Gilbert, Circuit Judges, and Deady, District Judge.

By the Court, McKenna, J.

This is an action of ejectment brought by the plaintiff, against the defendants, who are severally in the possession of lots in the Town of Johnsville, in the County of Plumas, State of California.

The plaintiff claims title under the Mammoth Gold Mining Co., to which a patent was issued on the 18th of May, 1877. The patent purports on its face to have been issued in pursuance of the revised statutes of the United States, upon an entry made by said mining company, March 17, 1877. In fact, however, the land was applied for by John B. McGee and James M. Thompson, August 30, 1867. The location, therefore, is claimed to have been made under the act of July 26, 1866.

Under this act no location could exceed 200 feet in length along the vein for each locator, with an additional claim to the discoverer. Laterly it could be extended to conform to local laws and customs, but in no case could cover more than one vein or lode. Subsequent laws confined the width to 300 feet. If the plaintiff's patent be so confined, it does not cover the lot in possession of defendants, hence the contention is as to the width plaintiff is entitled to claim.

The legislation in regard to the location of mining claims consist of the said act of July 26, 1866, and an act passed May 10th, 1872, entitled "An Act to promote the development of the mining resources of the United States," and chapter 6 of the revised statutes.

The act of May 10, 1872, repealed that of July 26, 1866, and was itself superseded by the revised statutes. The latter, however, as the act of May 10, did, preserved the essential rights obtained prior thereto, but distinguishes as the act of May 10 did, between the length and width of claims. The length by the following language: "That mining claims * * * heretofore located shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location;" the width by the following: "No claim shall extend more than 300 feet on each side of the middle vein at the surface * * *."

The provision for the width of claims is as clearly universal as the provision for the length, and each completes the other. Omit either and there is defect.

Plaintiff's counsel contends that the provision for the width of claims applies only to subsequent locations, and that section 2328 of the revised statutes reserves to plaintiff the provisions of the act of July 26, 1866.

Section 2328 of the revised statutes is as follows: "Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provision of this chapter; and all patents for mining claims upon veins or lodes heretofore issued, shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two."

It is not contended that plaintiff's interests were so far vested that by that act that Congress had no power to limit or vary them. We shall assume, therefore, that Congress had this power, and having it, we think it exercised it in the provisions we have quoted.

The language of the section of the revised statutes must be confined to preserving the application, and of all rights except the size of the claim—length and width of it. All the provisions of the statutes would not otherwise be given effect.

The Land Department, therefore, had no power to issue a patent for a greater width of land than 300 feet, and the patent in this case in excess of 300 feet is void.

Doolan vs. *Carr*, 125 U. S., 624, and the other decisions cited in the opinion of the learned Judge who tried the case in the Circuit Court.

The plaintiff, however, urges that the defendants are his tenants, and therefore estopped to deny his title. If the fact is true, there is no doubt about the law, and we have no desire to weaken its firmness.

The evidence was presented through the medium of a stipulation, from which it appears that there are three classes of defendants: First. Those who subsequent to the date of the patent, in the language of the stipulation, "paid a small sum as rent to the Sierra Buttes Company, for the privilege of occupying said premises." Second. Those who entered since 1883 with the express permission of said company. Third. Those who entered without asking permission, but with the understanding that said corporation did not object to the occupation of village lots, provided its use and enjoyment of the patented premises were not interfered with.

The Sierra Buttes Company was the immediate predecessor of the plaintiff, and there is no proof that it ever had possession of the lands which defendants occupy.

As to the first class, it will be observed, they paid a small sum

in 1883, as rent. For what period, it does not appear, or under what circumstances, nor for what premises. Was it for past occupation or for a future occupation? Was it for a period expired or for one which has not yet expired? And for what premises? The defendants in this class were in possession at the time the small sum was paid, and we think the stipulation is too meager to justify the inference that they were tenants of plaintiff six years afterwards, and bound to yield a possession which they did not receive from him or those under whom he claims, and whom it does not appear they recognized afterwards, and who never had the title or right to possession.

The defendants in the other two classes are not distinguished, and as we cannot hold that a floating understanding that the company did not object to the occupation of town lots, made it the landlord of all who took possession, with a consequent estoppel to question its title, even if express permission would have that effect, we cannot reverse the judgment. It was appellant's duty to distinguish the classes and to identify the defendants composing each.

If there was error affecting plaintiff's rights as to any of the defendants, the Record should enable this Court to apply a remedy as to them. As the Record does not do this, the judgment must be affirmed as to all.

Judgment is therefore affirmed.

[Endorsed]: Opinion. Filed January 30, 1893.
F. D. MONCKTON, Clerk.

Judgment.

United States Circuit Court of Appeals, for the Ninth Circuit.
No. 28, October Term, 1892.

WILLIAM H. LAKIN, Plaintiff in Error,
vs.
JOHN H. ROBERTS ET AL.

In error to the Circuit Court of the United States, for the Northern District of California.

This cause came on to be heard on the Transcript of the Record from the Circuit Court of the United States, for the Northern District of California, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in

this cause be, and the same is hereby affirmed, with costs, and the cause is remanded to said Circuit Court for such further proceedings as may be necessary, and in accordance with the opinion of this Court.

[Endorsed]: Filed January 30, 1893.

F. D. MONCKTON, Clerk.

Denial of Rehearing.

At a stated term, to wit: the October Term, A. D. 1892, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the court room in the City and County of San Francisco, on Monday, the first day of May, in the year of our Lord one thousand eight hundred and ninety-three.

Present: The Honorable Joseph McKenna, Circuit Judge; Honorable Thomas P. Hawley, District Judge.

WILLIAM H. LAKIN,
vs.
J. H. ROBERTS ET AL. } No. 28.

It is ordered that the petition for a rehearing heretofore filed herein be and the same is hereby denied.

Clerk's Certificate.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, do hereby certify the foregoing to be full, true and correct copies of the printed Transcript of the Record, the stipulation for the substitution of certain defendants in error, order of substitution of certain defendants in error, the opinion and judgment of the Court, and the order denying petition for rehearing in the cause entitled William H. Lakin, plaintiff in error, *vs.* J. H. Roberts et al., No. 28, in our said United States Circuit Court of Appeals. And I further certify that the same together constitute a full, true and correct copy of the entire Record in said cause, as the same remains of record in my office.

Attest my hand and seal of said Circuit Court of Appeals, this 26th day of October, A. D. 1893.

[SEAL.] F. D. MONCKTON, Clerk.

1067

JAMES H. McK...

Petition for Writ of Error or Certiorari to the Circuit Court of Appeals, Ninth Circuit, with Argument and Notice.

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

WM. H. LAKIN,

Plaintiff in Error and Petitioner.

vs.

JOHN H. ROBERTS ET AL.,

Defendants in Error.

H. L. GEAR,
Attorney for Petitioner.

Filed, ... *1893.*

GEO. SPAULDING & CO., PRS., 414 CLAY ST., SAN FRANCISCO.

IN THE SUPREME COURT

OF THE

UNITED STATES.

WM. H. LAKIN,

Plaintiff in Error and Petitioner,

vs.

J. H. ROBERTS, W. C. ROBERTS, M. KERR AND MRS. KERR, HIS WIFE, P. LAURENZI, JOHN DALY, T. TIVENON, J. F. BACHER, JOHN WILLOUGHBY, JOHN NEVILL, JOHN KNIGHT, A. CURTIS, D. ROBINSON, H. B. HOUGHTON, J. F. HOUGHTON, JOHN THOMAS, MRS. J. MENZIES, GEO. WOODWARD, MRS. ANNA JENKINS, MRS. O. B. DOLLY, ADMINISTRATRIX OF THE ESTATE OF O. B. DOLLY, DECEASED, MRS. O. B. DOLLY, WM. PASSETTA, ADMINISTRATOR OF THE ESTATE OF M. A. PASSETTA, DECEASED, B. L. JONES, M. WILLOUGHBY, W. H. THOMAS, JOHN POWNING, SOL. BABB, MRS. BABB, HIS WIFE, GEO. HAKE, G. E. COOK, FRANK MEFFLEY, GEO. MAXWELL, ROBT. PENMAN, L. CIPRIOTTO, FRANK TUCKER, H. S. DUNN, WM. LITTECOTT, JOHN CREIGHTON, F. VANZINI, EDWARD MITCHELL, WM. GALLAGHER, A. GRAZIER, H. PERIN, M. CURTIS, MRS. E. STEPHENS, JACK MONI, HENRY DONEY AND L. GRONDONI,

Defendants in Error and Respondents.

Petition for Writ of Error or Certiorari to Review the Decision and Judgment of the Circuit Court of Appeals for the Ninth Circuit.

The petition of said Wm. H. Lakin respectfully represents that he presents herewith for the consideration of this Court a certified copy of the record of the above entitled cause, as the same appears of record in the said Circuit Court of Appeals, and hereby refers to the same and makes it a part of this petition.

Petitioner respectfully shows, as appears from the said rec-

ord, that on the 5th day of December, 1889, your petitioner, Wm. H. Lakin, a citizen and resident of the State of Ohio, commenced an action of ejectment in the Circuit Court of the United States, Ninth Circuit, Northern District of California, against certain defendants named therein, who were citizens and residents of said State and district (Record, pp. 1–4); that issue was joined upon said complaint by certain defendants represented by Goodwin & Goodwin, as their attorneys (*Id.*, pp. 4–7); that the jurisdiction of said Court, though invoked by the complaint upon the ground of the diverse citizenship of the parties, did not depend entirely upon the opposite parties to said suit being citizens of different States; but the record of said cause in said Court shows (*Id.*, pp. 28–34, 43–64, 69–83), that the case necessarily involved a Federal question as to the proper construction and effect of the statutes of the United States as affecting the validity of a mineral patent issued by the Government of the United States to the grantor of plaintiff, upon the validity of which plaintiff's right to recover in said action wholly depended; and that the said Court by its decision construed the said statutes adversely to the contention of said claimant, and denied the validity of said patent and the jurisdiction of the Land Department of the United States to issue the same, so as to cover the land in controversy in said action, and thereby denied to your petitioner a right and privilege claimed under the laws of the Congress of the United States and under a patent issued by the Government of the United States.

Petitioner further respectfully shows, as appears from the said record, that on the 30th day of December, 1891, your petitioner sued out a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said Circuit Court; and thereafter duly filed the transcript of the record of said Circuit Court in said Circuit Court of Appeals, and that the said record directly presented for the decision of the said Circuit Court of Appeals the same Federal question, which was determined by the said Circuit Court; and that the jurisdiction of said Circuit Court of Appeals did not depend entirely upon the opposite parties to said suit being citizens of different States, but that the case before it necessarily and directly involved such Federal question; and that the said Circuit Court of Appeals by its decision affirmed the decision of said Circuit Court as to the construction and effect of the statutes of the Uuited States, and denied the validity of said patent under which plaintiff claimed the right to recover in said action of ejectment, and under which his right to recover

therein wholly depended and denied the validity of said patent and the jurisdiction of the Land Department of the United States to issue the same, so as to cover the said land in controversy in said action, and thereby denied to your petitioner a right and privilege claimed under the laws of the Congress of the United States and under a patent issued by the Government of the United States.

Petitioner further respectfully shows that the judgment of the said Circuit Court of Appeals was rendered on the 30th day of January, 1893, and that on the 1st day of May, 1893, said Court finally denied a rehearing of said cause upon petition of said plaintiff in error therefor.

Petitioner further respectfully shows, as appears from the said record (p. 3), that the value of the land in controversy in said suit exceeds the sum of $5,000.

Petitioner further respectfully shows that the said decision of said Circuit Court and of said Circuit Court of Appeals are manifestly erroneous; and that the questions involved in this cause are of great importance to many persons, and that the said decisions involve the validity of a large number of patents issued since the passage of the revised statutes in pursuance of applications made under the mineral Act of 1866; and that the said decisions are counter to the uniform construction given to the laws of Congress by the Land Department for more than twenty years; and that it is of great importance that this Court should finally settle the questions here involved.

Wherefore petitioner prays that a writ of error or of *certiorari* may be allowed by this Honorable Court for the review and reversal of the said decisions and of the judgment of said Circuit Court of Appeals affirming the judgment of said Circuit Court, and for such other relief as to this Honorable Court shall seem just and proper in the premises.

WM. H. LAKIN, Petitioner.
Per H. L. GEAR, his Attorney.

Argument in Support of Petition.

The case, as decided by the Circuit Court of Appeals, is made to hinge upon the construction of the revised statutes of the United States, upon the single question whether the *width* of lode claims located prior to the passage of the Act of May 10, 1872, is absolutely limited by the terms of section 2320, declaring that "no claim shall extend more than three hundred feet on each side of the vein at the surface;" so that, notwithstanding a location of surface of greater width for working purposes

on the working side of a vein, made prior to the Act of May 10, 1872, was covered and protected by the terms of the original Mining Act of July 26, 1866, and notwithstanding an application for a patent for such claim was pending in the Land Office, upon a preliminary survey and diagram of the claim in accordance with sections 1, 2, 3 and 4 of the Act ot 1866, and notwithstanding the time for adverse claim under the application had expired prior to the passage of the Act of 1872, yet no entry could be made or patent issued under such pending application after the passage of said Act, for any greater quantity of surface on either side of the lode line than three hundred feet.

It appears from the record in this case that the application for the patent, the validity of which is in controversy, was made August 30, 1867, and was for a quartz lode extending along a mountain side; that the surface lines of the location extended fifty feet up the mountain above the line of the lode, but were so extended laterally down the side of the mountain as to include the surface between the lode and Jamison creek about one thousand feet distant, for working purposes, in order to include all tunnels run or to be run into the side of the mountain, a tramway and road leading from the tunnel to the creek, a millsite located along the creek and certain timber and the water of the creek for working purposes—all of which were needed for the convenient working of the ledge. It was represented to the Land Office, in the application for the patent for the claim, that the applicants had previously occupied the land applied for, and improved the same according to the local customs and rules of miners in the district where the same was situated, and had expended in actual labor and improvement thereon an amount not less than one thousand dollars, and that there was no controversy as to the claim to their knowledge, and that they therewith presented a diagram of said mining claim so extended as to conform to the rules of said mining district (Record, folio 53). The records of the Land Office establish that the requisite notice required by the Sec. 3, of the Act of 1866, was thereupon given for the period of ninety days, and that no adverse claim was filed in the Land Office at any time (Record, folios 53–4). They also show that a preliminary survey of the claim had been made by the Deputy Surveyor-General, in conformity to which the diagram had been filed and posted on the claim and in the Land Office (Record, folio 51). They also show that after the passing of the Act of May 10, 1872, to wit, in 1877, the Surveyor-General approved and filed the preliminary survey of the claim made by his deputy (Rec-

ord, folios 51, 54); that an entry was made by the successors of the applicants in pursuance of the original application (Record, folios 56–7), and a patent was thereupon issued to them. The patent purports to be issued pursuant to the revised statutes of the United States, but the descriptive references therein contained, taken in connection with the entry and survey, fully identify the claim granted with the claim applied for by the original applicants, and entered by their successors in interest. The receiver's receipt showing the entry for the patent expressly identifies the land entered and paid for with the land applied for by the original applicants under the Act of July 26, 1866 (Record, folios 56–57).

The question, therefore, is whether the second section of the Act of 1872, incorporated in Sec. 2320 of the revised statutes by the provision therein contained, that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface," operated retroactively so as *ipso facto* to destroy the validity of the Mammoth Claim as to any excess of three hundred feet in width between the lode and Jamison creek, and utterly to deprive the Land Department of jurisdiction to receive an entry or issue a patent therefor, although the claim had been previously covered and protected to its full extent by the express terms of the Act of 1866.

1. *Act of* 1872 *Prospective by its Terms.*

Sec. 2320 of the Revised Statutes is identical with section 2 of the Act of May 10, 1872, and is as follows:

"Sec. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode, by the customs, regulations and laws in force at the date of their location. A mining claim located after the 10th day of May, 1872, whether located by one or more persons, may equal, but shall not exceed one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet in width on each side of the vein at the surface, nor shall any claim be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse right existing on the 10th of May, 1872, render such limitation necessary. The end lines of each claim shall be parallel to each other."

This section, considered by itself, without reference to other statutory provisions, or inquiry into the principles by which its construction is to be determined is ambiguous, and susceptible of two different interpretations. If we look only at the literal terms of the section, the words "*no claim*" in the third sentence may be construed *all comprehensively and retroactively* so as to operate upon all previously located claims, as well as upon those located after the passage of the Act of May 10, 1872; and the Circuit Court and the Circuit Court of Appeals have both so construed them. On the other hand we think those words may without violence be construed prospectively as applying only to claims located after the 10th day of May, 1872, by immediate reference to the last subject matter of enactment specified in the immediately preceding sentence, which may be construed as applying to each remaining sentence of the section, so that the last three sentences may be considered as regulating the *length, discovery, width and parallelism of end lines of claims located after the passage of the Act of May* 10, 1872, and as neither of them having any retroactive operation upon claims theretofore located, and we think they should be so construed, for the reasons hereinafter given.

This Court has recognized the prospective operation of the provision for the *parallelism of end lines.* It has said:

"Under the Act of 1866, parallelism in the end lines of a surface location was not required; but, *when a location has been made since the Act of* 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines."

Iron Silver Mining Co. vs. *Elgin M. and S. Co.*, 118 U. S., 196–209.

If the last sentence of Sec. 2320 is prospective and not retrospective in its operation, the same must be true of the next to the last sentence of that section.

The Circuit Court of Appeals in its decision objects that under this interpretation the revised statutes would appear *defective* in merely providing for the *length* of claims located prior to May 10, 1872, and not providing for their width. But those statutes *expressly provide for the protection of all pending applications and existing rights* (Secs. 2328, 2344), and the objection is further met and answered by the proper consideration of section 2322, of the revised statutes which corresponds with section 3, of the Act of 1872, and immediately

followed in that Act the section in controversy, and which expressly provides that "*the locators of all mining locations heretofore made*, or which shall hereafter be made, on any mineral vein or ledge situated on the public domain, *their heirs and assigns, where no adverse claims exists on the 10th day of May*, 1872, so long as they comply with the laws of the United States, and with State, Territorial and local regulations not in conflict with the laws of the United States governing their possessory title, *shall have the exclusive right of possession and enjoyment* OF ALL THE SURFACE INCLUDED WITHIN THE LINES OF THEIR LOCATIONS," etc.

The fact that this section also applies as well to the rights of locators of all mining locations "which shall hereafter be made," and that the right of possession and enjoyment is qualified generally by the terms "*so long as they comply* with the laws of the United States," etc., affords no reply to the proposition that the locators of previous locations are expressly protected to the full extent of "ALL THE SURFACE INCLUDED WITHIN THE LINES OF THEIR LOCATIONS."

The condition that all locators shall "*comply* with the laws of the United States," can only refer to such acts of compliance as are affirmatively required by those laws. The conditions of annual labor, and of the mode and terms of future applications for patents, or the presentation of adverse claims during the period limited therefor, must be complied with by all to whom those conditions apply. So likewise, all persons who undertake to locate claims after the passage of the Act of 1872, must comply with the requirements of that statute as to the manner and extent of the location. But the condition of *complying* with the Act of 1872, so far as regards the *location* of claims, manifestly does not and cannot apply to mining locations made before the passage of that Act. If a prior location had been made which was protected by the Act of 1866, the Act of 1872 no where requires the locator to *re-locate* it, or if it had been surveyed and diagrammed upon application for a patent under the former Act, no where requires him to *re-survey* his claim, or to *make, or file in the Land Office, any new diagram* thereof. He has therefore *nothing to comply with* on his part, *as respects the lines of his location*. But so long as he *complies* with the laws of the United States, and other laws *governing his possessory title* in so far as they require *acts of compliance* on his part, he is expressly protected, as are "the locators of all mining locations heretofore made," in the "EXCLUSIVE RIGHT OF POSSESSION AND ENJOYMENT OF ALL THE SURFACE INCLUDED WITHIN THE LINES OF THEIR LOCATIONS."

No good reason appears why the *length* of lode claims located prior to May 10, 1872, should be determined by the laws in force at the date of location, to the exclusion of the *width* of surface lawfully occupied by the locators for working purposes. The *lode* is certainly *the principal thing of value;* and if an association of persons can claim 3,000 feet along a lode, instead of merely 1,500 feet, because the location was made prior to the Act of 1872, there seems to be no good reason why they should not be allowed the *incidental privilege* of "*a reasonable quantity of surface for the convenient working of the same*, as fixed by local rules," although the surface claimed prior to that Act may on the only working side of the lode exceed three hundred feet in width. The bare and unproductive surface down a mountain side is presumably of far less value than the lode, and it seems unreasonable to construe the statute as *making more of the incident* than it does of *the principal thing*, in its preservation of existing rights.

But no room is left for doubt as to the wholly prospective nature of the provision of the Act of 1872 limiting claims to three hundred feet in width on each side of the vein, when the express terms of that Act are considered. The Act of 1872 CONTAINS THE MOST FORMAL AND EXPRESS RESERVATION OF ALL EXISTING RIGHTS ACQUIRED UNDER THE ACT OF 1866.

Sec. 9 of the Act of 1872, reads as follows:

"SEC. 9. That sections one, two, three, four and six of 'An Act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' approved July twenty-sixth, eighteen hundred and sixty-six, are hereby repealed, BUT SUCH REPEAL SHALL NOT AFFECT EXISTING RIGHTS. APPLICATIONS FOR PATENTS NOW PENDING MAY BE PROSECUTED TO A FINAL DECISION IN THE GENERAL LAND OFFICE; but in such cases, where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this Act; and all patents for mining claims heretofore issued under the Act of July twenty-sixth, eighteen hundred and sixty-six, shall convey all the rights and privileges conferred by this Act, where no adverse rights exist at the time of the passage of this Act."

It is further to be observed that in Sec. 12, of the Act of 1872, are found the following additional words expressly preservative of rights previously acquired under the Act of 1866:

"Nothing in this Act shall be construed to enlarge or affect the rights of either party in regard to any property in controversy at the time of the passage of this Act or of the Act entitled 'An Act granting the right of way to ditch and canal

owners over the public lands, and for other purposes,' approved July twenty-sixth, eighteen hundred and sixty-six. NOR SHALL THIS ACT AFFECT ANY RIGHT ACQUIRED UNDER SAID ACT."

We further find in Sec. 16, of that Act, the following UNEQUIVOCAL LANGUAGE:

"Sec. 16. That all Acts and parts of Acts inconsistent herewith are hereby repealed; PROVIDED, THAT NOTHING CONTAINED IN THIS ACT SHALL BE CONSTRUED TO IMPAIR, IN ANY WAY, RIGHTS ACQUIRED UNDER EXISTING LAWS."

The effect of this proviso, taken in connection with the express reservation of "*existing rights*" under the Act of 1866, made in section 9, and of "*any rights acquired under said Act*," in section 12, was undoubtedly to continue in existence by the very terms of the Act of 1872, every right acquired previous to its passage and existing at its date which was covered and protected by the Act of 1866, and *absolutely to forbid any retrospective construction or operation of the Act of* 1872, *so as to impair those rights* "IN ANY WAY."

The proviso contained in Sec. 16, of the Act of 1872, is embodied in the same terms in section 2344 of the revised statutes.

All of the rights preserved by the Act of 1872 are further expressly preserved and protected by section 5597, of the revised statutes, which is declarative of the uniform policy of Congress to preserve all rights, and not to impair them by any retrospective operation or construction whatever.

That section reads as follows:

"SEC. 5597. The REPEAL of the several Acts embraced in said revision SHALL NOT AFFECT ANY ACT DONE, OR ANY RIGHT ACCRUING OR ACCRUED, OR ANY SUIT OR PROCEEDING HAD or commenced in any civil cause BEFORE THE SAID REPEAL, BUT ALL RIGHTS and liabilities under said Acts SHALL CONTINUE, AND MAY BE ENFORCED IN THE SAME MANNER, AS IF SAID REPEAL HAD NOT BEEN MADE," etc.

The Court is thus not only warranted, but expressly required to look to the terms of the repealed Act of 1872, to find out what rights existed under it, or were continued in existence by it; for all existing rights were regarded by Congress as *sacred*, and as enforceable under the terms of laws existing at the date of the revision in like manner, as if there had been no repeal of those laws. It is further to be considered that by the use of the words "*former laws*," in section 2328 of the revised statutes, which declares that "*applications for mining claims* UNDER

FORMER LAWS, *now pending, may be prosecuted to a final decision in the General Land Office,"* etc., Congress expressly intended to refer to applications pending *under the original quartz mining law of* 1866, and *under the original placer mining law of* 1870, applications under both of which laws were expressly protected from all invasion or retrospective impairment "IN ANY WAY," by the express terms of the Act of 1872.

II. *Retrospective Construction Inadmissible.*

A retrospective construction of section 2320 so as to impair existing rights is not only rendered inadmissible by the term of the Act of 1872, but would be inadmissible irrespective of those terms on other grounds.

1st. *Mining claims are not mere pre-emptive rights, but rights of property vested by conditional grant, which cannot be impaired while the conditions are fulfilled.*

Belk vs. *Meagher*, 104 U. S., 279.
St. Louis Smelting Co. vs. *Kemp*, 104 U. S., 636.
Chambers vs. *Harrington*, 111 U. S., 350.
Noyes vs. *Mantle*, 127 U. S., 348.
Dahl vs. *Raunheim*, 132 U. S., 260.
Dahl vs. *Montana Copper Co.*, 132 U. S., 264.
Talbott vs. *King*, 6 Mont., 76.
Butte City Smoke House Lode Cases, 6 Mont., 397.

Rights vested under a statutory grant cannot be divested at the mere will of the law making power.

Fletcher vs. *Peck*, 6 Cranch., 87.
Ferrett vs. *Taylor*, 9 Cranch., 43.
Town of Paulett vs. *Clark*, 9 Cranch., 292.
Grogans vs. *San Francisco*, 18 Cal., 591.
Benson vs. *Mayor*, 10 Barb., 223.

An accepted conditional grant made by law is a binding contract, the obligations of which cannot be impaired by the Government while the conditions are complied with by the grantee.

McGethee vs. *Matthias*, 4 Wall., 143.
David vs. *Gray*, 16 Wall.

2d. *Retrospective construction of a statute is never allowable where prospective construction is possible, whether a prior existing right can be constitutionally taken away or not.*

Endlich on Int. of Statutes, Secs. 271–2–3.
U. S. vs. *Heath*, 3 Cranch, 413.

U. S. vs. *Moore*, 95 U. S., 760.
Auffmordt vs. *Raisin*, 112 U. S., 620.
Chew Hong vs. *U. S.*, 112 U. S., 536.
Twenty per Cent. Cases, 20 Wall., 179.
Murray vs. *Gibson*, 15 How., 421.
McEwen vs. *Den*, 24 How., 242.
Dash vs. *Van Kleck*, 7 Johns., 503.
Sackett vs. *Andros*, 5 Hill, 334.

In the last case cited there, is an able review of the authorities upon the rules that "a statute should not be construed so as to give it a retrospect beyond the time of its commencement," "and *general words* in a statute shall be restricted so as not to do a wrong to any one," and that an Act establishing a *new rule* "OUGHT NOT TO HAVE A RETROSPECTIVE OPERATION, UNLESS SO DECLARED IN THE MOST UNEQUIVOCAL MANNER," the Court remarks that the same doctrine prevails in the common and civil laws and is "a general principle of general jurisprudence," and remarks further that "IT IS SO CONSONANT WITH THE PRINCIPLES OF NATURAL JUSTICE, THAT IT MUST BE FOUND EVERYWHERE UNTIL WE GET BEYOND THE LIMITS OF CIVILIZATION."

III. *Construction of Land Department to be Followed as a Rule of Property.*

For more than twenty years the Land Department of the United States has construed the words in question here as prospective only, and a rule of property has grown up under its construction which ought not at this late day to be disturbed.

On the 10th day of June, 1872, the Commissioner of the General Land Office issued its circular for the information of all the District Land Offices, and of mining claimants generally, embodying the text of the Act of May 10, 1872, and declaring:

"*Second*. By an examination of the several sections of the foregoing Act, it will be seen that *the status of lode claims located previous to the date thereof is not changed with regard to their extent along the lode* OR WIDTH OF SURFACE, such claims being restricted and governed both as to their *lateral* and *lineal* extent by the State, territorial or local customs or regulations, which were in force at the date of such location, in so far as the same does not conflict with the limitations fixed by the mining statute of July 26, 1866.

"*Eighth*. Applications for patents for mining claims pending at the date of the Act of May 10, 1872, may be prosecuted to final decision in the General Land Office, and when no ad-

verse rights are affected thereby, patents will be issued in pursuance of the provisions of said Acts.

"*Tenth.* With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Act provides that the lateral extent of location of veins or lodes *made after its passage*, shall in no case exceed three hundred feet on each side of the middle of the vein at the surface," etc.

Copp's U. S. Mining Dec. (ed. 1874), pp. 270, 275, 277.

These instructions were clearly warranted by the express reservations made in the Act of 1872, for the absolute protection of all existing rights.

Every circular of instruction issued from the General Land Office since that date, whether under the act of 1872, or under the revised statutes, has followed the same construction, and hundreds of patents have been issued since May 10, 1872, and since the adoption of the revised statutes, in pursuance of that construction. The patent in controversy is a practical proof of the construction placed upon the revised statutes by the Land Department.

The Chollar-Potosi Mine in Nevada, patented under the Act of 1866, appears to have had a width of 1,081 feet, and a length of 1,400 feet.

Copp's U. S. Mining Laws (ed. of 1874), pp. 96–7.

Many other patents have been issued both before and since the Act of 1872, in pursuance of the Act of 1866, conveying an irregular surface of many acres, occupied in connection with a lode for working purposes throughout the Pacific States and Territories.

On Dec. 26, 1872, the Commissioner of the General Land Office wrote as follows in a decision addressed to the Register of the local land office at Central City, Colorado:

"On the 10th of May, 1872, Congress passed a new mining Act, and repealed said section two of the Act of 1866, expressly declaring, however, in the ninth section thereof, that 'such repeal shall not affect existing rights,' and again in the twelfth, 'nor shall this Act affect any rights acquired under said Act' of July 26, 1866, and to impress this point more fully, the same idea is again repeated in the sixteenth section where it declares that "nothing in this Act shall be construed to impair in any way rights or interests in mining property required under existing laws." *Where the application for patent was pending under the Act of July* 26, 1866, *on the* 10*th day of May*, 1872, NONE OF

THE RIGHTS WHICH THE APPLICANT HAD ACQUIRED BY VIRTUE OF COMPLIANCE WITH SAID ACT OF 1866, WERE AFFECTED OR IMPAIRED IN ANY WAY. * * * AND ALL PATENTS ISSUED SINCE THE 10TH DAY OF MAY, 1872, UPON APPLICATIONS PENDING AT THAT TIME, EXPRESSLY CONVEY TO THE PATENTEE:

"*First.* THE SURFACE GROUND EMBRACED BY THE INTERIOR BOUNDARIES OF THE SURVEY," etc.

Copp's U. S. Mining Dec. (ed. 1874), pp. 154–5.

In a communication to the Surveyor-General of Wyoming, Nov. 18, 1873, the Commissioner of the General Land Office wrote as follows:

"If the claim was located prior to May 10, 1872, the *size of the claim, both as regards the length and width*, is regulated by the local laws, customs and rules. If the claim was discovered since May 10, 1872, the size of the claim is limited by the Act bearing date the 10th May, 1872.

"Very respectfully, etc.

"WILLIS DRUMMOND, Commissioner."

Id., p. 235.

On June 29, 1875, the Secretary of the Interior decided that "a *bona fide* application for a patent under the Act of 1866 is such *an appropriation of the premises embraced therein* as to take them out of the operation of the local laws" upon the question of an abandonment or forfeiture of the claim, and that consequently, under an application made Oct. 16, 1866, a patent might issue under an entry made in 1874, if there had been continuous possession of the claim, and no failure to comply with the provisions of the mining Act.

Sickles Mining Dec., p. 67.

Other decisions of the Land Department are as follows:

"*An application for a patent withdraws the lands therein described from subsequent application, until the first application is withdrawn or rejected.*" (June 11, 1880.)

Sickles Mining Dec., p. 105.

After an application has been made for a patent for a given mining claim, such claim is *virtually withdrawn from market*, pending the final dispositien of the case." (Nov. 5, 1874.)

Id., p. 116.

"Where the application for patent was pending under Act of 1866, on the 10th day of May, 1872, *none of the rights which*

the applicant had acquired by virtue of compliance with said Act of 1866 *were affected or impaired in any way,* but patents issued upon applications of this class convey the same rights which were conveyed under the Act of 1866, together with all other veins or lodes, the tops or apexes of which lie inside the exterior boundaries of the surface ground patented to the extent and in the manner provided by the third section of the Act of May 10, 1872." (Aug. 17, 1874.)

Id., p. 188.

These rulings of the Land Department, and many others not reported, in respect to the issuance of patents applied for under the Act of 1866, ought now to be followed as a RULE OF PROPERTY. If the original construction of the law were doubtful, their unchallenged construction of it, as prospective only, for a period of twenty years, ought not now to be challenged or overthrown.

" In the construction of a doubtful or ambiguous law, the contemporaneous construction of those who were called upon to act under it, *and were appointed to carry its provisions into effect, is entitled to very great weight.*"

Edwards' Lessee vs. *Darby*, 12 Wheat., 210.
Hahn vs. *U. S.*, 107 U. S., 402–406.
U. S. vs. *Johnson*, 124 U. S., 236.

" The construction given to a statute by *those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reason. The officers concerned are usually able men and masters of the subject.* Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

U. S. vs. *Moore*, 95 U. S., 760.
Brown vs. *U. S.*, 113 U. S., 568.
Heath vs. *Wallace*, 138 U. S., 573.

" It is a familiar rule of interpretation, that, in the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect. *While, therefore, the question is by no means one free from doubt,* we are not inclined *to interfere at this late day with a rule which has been acted upon* by the Court of Claims, and the executive *for so long a time.*"

U. S. vs. *Pugh*, 99 U. S., 265.

See also—

U. S. vs. *Philbrick*, 120 U. S., 52.
U. S. vs. *Hill*, 120 U. S., 169.

"This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, *and in a case of doubt, ought to turn the scale.*"

Brown vs. *U. S.*, 113 U. S., 568.

"This construction of the statute in practice, concurred in by all the departments of the government and continued for so many years, *must be regarded as absolutely conclusive in its effect.*"

U. S. vs. *Hill*, 120 U. S., 169.

"The principle that *the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and* SHOULD ORDINARILY CONTROL THE CONSTRUCTION OF THE STATUTE BY THE COURTS, is so firmly imbedded in our jurisprudence that no authorities need be cited to support it. ON THE FAITH OF A CONSTRUCTION THUS ADOPTED, RIGHTS OF PROPERTY GROW UP, WHICH OUGHT NOT TO BE RUTHLESSLY SWEPT ASIDE, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

Pennoyer vs. *McConnaughey*, 140 U. S., 1.

"It is a settled doctrine of this Court that, *in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and,* IF SUCH CONSTRUCTION BE ACTED UPON FOR A NUMBER OF YEARS, WILL LOOK WITH DISFAVOR UPON ANY SUDDEN CHANGE, WHEREBY PARTIES WHO HAVE CONTRACTED WITH THE GOVERNMENT UPON THE FAITH OF SUCH CONSTRUCTION MAY BE PREJUDICED. IT IS ESPECIALLY OBJECTIONABLE THAT A CONSTRUCTION OF A STATUTE FAVORABLE TO THE INDIVIDUAL CITIZEN SHOULD BE CHANGED IN SUCH MANNER AS TO BECOME RETROACTIVE."

U. S. vs. *Alabama Great Southern R. R. Co.*, 142 U. S., 615.

Conclusion.

Petitioner respectfully submits that the foregoing considerations are sufficient to show that a great and manifestly prejudicial error has been committed by the Circuit Court of Appeal in the construction of the Federal Statutes, and in denying jurisdiction to the Land Department to issue the patent to plaintiff's grantor, under which plaintiff claims, in pursuance of the application therefor, which was pending when the Act of 1872 was passed, all rights under which were preserved by its express terms.

H. L. GEAR,
Attorney for Petitioner.

Notice of Submission of Petition for Writ of Error or Certiorari.

To Messrs. Goodwin & Goodwin, attorneys for the defendants in error herein before named:

You are hereby notified that on Monday, the 4th day of December, 1893, at 12 M., or as soon thereafter as counsel can be heard, the plaintiff in error, Wm. H. Lakin, will submit to the Supreme Court of the United States the foregoing petition for a writ of error or *certiorari* to review the decision and judgment of the Circuit Court of Appeals for the Ninth Circuit, whereby on the 30th day of May, 1893, it affirmed the judment of the Circuit Court for the Ninth Circuit Northern District of California in the case of *Wm. H. Lakin, plaintiff in error,* vs. *J. H. Roberts et al., defendants in error,* and the further decision and judgment of said Circuit Court of Appeals denying the petition of the plaintiff in error for a rehearing of said cause rendered on the 1st day of May, 1893, and that said submission will be made upon said petition and the record in said cause, and the foregoing printed argument and any printed argument which may be submitted on behalf of the defendants in error in reply thereto.

Dated this 28th day of October, 1893.

H. L. GEAR,
Attorney for Wm. H. Lakin, Plaintiff in Error and Petitioner.